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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 267.

P. O. COX, SAM LEVY, AND W. M. EVANS, PLAINTIFFS IN ERROR,

vs.

W. B. THOMPSON.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED MAY 16, 1905.

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(19,768.)

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Caption.

THE STATE OF TEXAS, *County of Hamilton:*

At a term of the District Court, begun and holden within and for the County of Hamilton, at Hamilton, on the 29th day of February, A. D. 1904, and which adjourned on the 25th day of March A. D., 1904, the Hon. N. R. Lindsey, Judge thereof presiding, the following cause came on for trial, to-wit:

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Plaintiff's Original Petition.

Filed 9th day of June, 1902.

In the Hon. District Court of the 29th Judicial District of the State of Texas, August Term, 1902.

THE STATE OF TEXAS, *County of Hamilton:*

To the Hon. Judge of said Court:

Now comes W. B. Thompson, hereinafter styled plaintiff, and complaining of P. O. Cox, Sam Levy and W. M. Evans, hereinafter styled defendants, respectfully represents to the Court that the plaintiff resides in the County of Erath, and State of Texas, and that the defendant, P. O. Cox, resides in the County of Hamilton, in said State, and that each of the co-defendants, to-wit, Sam Levy and W. M. Evans, reside in the County of Tarrant, and State aforesaid.

1. For cause of action the plaintiff shows to the Court that the defendant P. O. Cox, under the firm name of P. O. Cox & Co., on or about the twenty second day of May, 1902, procured from the Tax Collector of Hamilton County, Texas, State and County license, to do business as a retail liquor dealer in said county and State in the city of Hico, on parts of lots, Nos. eleven and twelve, in Block No. three, Division, one in said city of Hico, and in the house known as the J. A. Gamble building.

That said license was procured for the purpose of engaging in the business of retailing spirituous, vinous and malt liquors capable of producing intoxication. That on or about the said last named date, and in connection with the procurement of said license, and for the purpose of being able to pursue said occupation, and as is required by law, the defendant, P. O. Cox, in his own name and alone as principal, made, executed and delivered for record a bond in the
2 sum of Five thousand dollars payable to the State of Texas as required by law, with the defendants, Sam Levy and W.

M. Evans as sureties on said bond, which said bond was duly and legally received and approved by J. C. Main County Judge of Hamilton County on the 22nd day of May, 1902. That under and by virtue of said bond and license the defendant, P. O. Cox, was authorized and in fact has been and is now doing business under the same as a retail liquor dealer, engaged in the business of selling and retailing spirituous, vinous and malt liquors capable of producing intoxication as hereinbefore alleged in said County and city of Hico.

2. That said bond is conditioned among other things that P. O. Cox & Co., (a firm composed of P. O. Cox) their agents and employees would not sell nor permit to be sold in their house or place of business nor give nor permit to be given any spirituous, vinous and malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty one years, and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business, which said bond was duly signed by all the defendants, and filed for record in the County Clerk's office of said Hamilton County, on the 22nd day of May, 1902, and which said bond is in words and figures substantially as follows, to-wit:—

"THE STATE OF TEXAS, *County of Hamilton:*

Whereas P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, to be drunk of the premises in quantities of one gallon or less at, ... in the town of Hico, in the County of Hamilton, State of Texas, and has made the application and paid the taxes required by law.

Therefore, know all men by these presents, that we P. O. Cox & Co., as principal, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally.

Conditioned, that the said P. O. Cox & Co. principal shall keep an open, quiet and orderly house or place for the sale of spirituous,
vinous or malt liquors and medicated bitters, capable of pro-
3 ducing intoxication, and that they or their agent or employé, will not sell nor permit to be sold in their house or place of business nor give nor permit to be given any spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication to any person under the age of twenty one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the Sheriff or other peace officer, by the wife, mother, or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell

spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, to be drunk on the premises in any quantity, to any person or persons, for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May, 1902.

P. O. COX,
SAM LEVY,
W. M. EVANS.

STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of the County Court in and for said County of Tarrant, do certify that Sam Levy and W. M. Evans whose names appear signed to the annexed bonds are in my opinion good and ample security for the amounts therein specified. That Sam Levy and W. M. Evans have property in said County subject to execution of a larger amount, and that if said bond was offered me for approval the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this
4 the 21st day of May, A. D. 1902.

[SEAL.] W. E. BUTLER,
Clerk of the County Court, Tarrant County, Texas,
By WALTER G. KING, *Deputy.*

THE STATE OF TEXAS, *County of Hamilton.*

Before me F. C. Williams, Clerk of the County Court in and for said County and tSate on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22 day of May, A. D. 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton County, Texas.

Examined and approved May 22, 1902.

J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

Filed for Record, May 22- 1902.

F. C. WILLIAMS,
C. C. CH. Ct.

3. Plaintiff further shows to the Court that he is the father of William W. Thompson, a son in his nineteenth year, who is in fact and appearance a mere boy.

That on or about, to-wit, May, 30th, 1902, after the procuring of the license by defendant P. O. Cox, and the filing of the bond hereinbefore set out, and within less time than one month from said date herein-before mentioned, the said minor William W. Thompson, without the knowledge or consent of this plaintiff or any one authorized to give such consent entered into defendant's house and place of business herein-before designated, in the said city of Hico, in said county and State, upon three different, distinct and separate occasions, and which said minor was allowed by the defendant, P. O. Cox to so enter and remain in said house and place of business upon the said several occasions, and did so enter and remain as aforesaid, to plaintiff's damage in the sum of fifteen hundred dollars, which said house and place of business was devoted to the sale of spirituous, vinous and malt liquors capable of producing intoxication, contrary to law and defendant's undertaking in his said bond.

4. Plaintiff would further show to the Court that said William W. Thompson, the minor son of this plaintiff, who was then and there allowed to enter and remain in the defendant's place
5 of business, was upon each of said three occasions herein-before set out and alleged to have occurred on or about the said 30th day of May, 1902, given and permitted to be given by the defendant, P. O. Cox, his agents and employés, intoxicating liquors, which was then and there upon each of said occasions sold and given, and permitted to be sold and given to said minor William W. Thompson, by the defendant, P. O. Cox, his agents and employés; that said intoxicating liquor was sold and given, and permitted to be sold and given to the said minor, William W. Thompson, by the defendant, P. O. Cox, his agents and employés, to this plaintiff's damage in the sum of fifteen hundred dollars.

5. Premises considered, plaintiff prays that each of the defendants be cited in terms of law to appear and answer herein, and that upon final hearing hereof, for the minor William W. Thompson entering and remaining in the house and place of business of the defendant P. O. Cox, a place devoted to the sale of spirituous, vinous, malt and intoxicating liquors capable of producing intoxication and the sale of spirituous, vinous and malt liquors under license and bond; that he have judgment against the said P. O. Cox and the sureties upon his bond, Sam Levy and W. M. Evans, for liquidated damages in the sum of fifteen hundred dollars; and that for the sale and gift and the permitting to be sold and given, spirituous, vinous and malt liquors to said minor, that he have judgment for liquidated damages against P. O. Cox, as principal, and Sam Levy and W. M. Evans as sureties on the bond of the said defendant, Cox, in the sum of fifteen hundred dollars; and that he have judgment upon the *the* several counts and violations of said bond, herein pleaded, liquidated damages in the sum total of three thousand dollars, together with all costs of suit in this behalf expended and for such other further gen-

eral and special relief as to the Court may seem equitable in the premises.

MAIN & CHESLEY,
Attorneys for the Plaintiff. W. B. Thompson.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Suit upon Liquor Dealer's Bond, for Statutory Penalty. Plaintiff's Original Petition. Filed 9th day of June 1902. R. C. Cornelius, Clerk Dist. Court, Hamilton Co. Texas.

Defendants' 2nd Original Answer.

6 Filed Mch. 3rd, 1904.

In District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants herein by attorney, and under leave of Court, files this defendants' 2nd Amended Original Answer, in lieu of and to take the place of defendants' original answer filed herein on, to-wit, the 25th day of August 1902, and for amendment say and allege.

First. Defendants demur to plaintiff's petition, and say the same shows no cause of action against them, and of this they pray judgment and etc.

D. LANGFORD,
Att'y for Defendants.

Second. And for special exception defendants say that plaintiff's petition is insufficient in law because the alleged liquor dealer's bond upon which this suit is predicated fails to show on what lot, block or street in the town of Hico, the said business of liquor dealer was carried *to* on, nor is the house where the same was located or to be located described or in any manner identified. Wherefore defendants say that said petition is insufficient in law, and of this they pray judgment, and etc.

D. LANGFORD,
Att'y for Defendants

Third. Now come the defendants herein and demur to plaintiff's petition filed herein, and say the same is insufficient in law, because that part of the act of the legislature under which this suit is brought regulating the sales of liquor and prescribing the tax and penalty, is unconstitutional, construed in connection with Art. 5060*i* of said act, in that said Art. exempts from the provision of the statute people

engaged in the same business, to-wit, the sale of vinous and intoxicating liquors, provided they sell wine produced from grapes grown in the State by the seller. And of this defendants pray judgment and etc.

D. LANGFORD,
Att'y for Defendants.

Fourth. Without waiving the foregoing exceptions or either of them, defendants deny all and singular the allegations in plaintiff's said petition contained and of this they put themselves upon the country etc.

D. LANGFORD,
Att'y for Defendants.

Fifth. And for further answer defendants say that if P. O. Cox, his agents or employees ever sold or gave or permitted to
7 be sold or given any intoxicating liquor to W. W. Thompson, he being a minor on or about the date alleged, which is not admitted but denied; that the same was sold and given to said Thompson in good faith, with the belief, and having good grounds for said belief that said W. W. Thompson was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

Sixth. And for further answer herein defendants aver that if W. W. Thompson being a minor ever entered and remained and was permitted to enter and remain in the saloon of P. O. Cox by the said P. O. Cox his agents and employés, as alleged in plaintiff's petition, which is not admitted but denied, that said W. W. Thompson so entered and remained in the place of business and saloon of said P. O. Cox for the purpose of securing intoxicants, the said P. O. Cox, his agents and employés believing and having good grounds to believe that said W. W. Thompson was twenty one years of age. And the said W. W. Thompson so entered and remained, if at all, no longer than was reasonably necessary to procure said intoxicants, which were sold and given to him by said P. O. Cox, his agents and employés in good faith, believing and having good grounds to believe that said W. W. Thompson was above the age of twenty one years. And defendants aver that the alleged entering and remaining of the said W. W. Thompson and the permission by the said P. O. Cox, his agents and employés, for said W. W. Thompson to enter and remain in the saloon of P. O. Cox was but a necessary incident and part of sales of intoxicants to said W. W. Thompson by the said P. O. Cox, his agents and employés, made in good faith, believing and having good grounds to believe that said W. W. — was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

Seventh. And for further answer herein defendants say that if W. W. Thompson ever entered and remained in the saloon of P. O. Cox & Co., that the same was for the purpose of procuring intoxicants, which were sold and given to him in good faith, with the belief that he was above the age of twenty one years, and after and before intoxicants were sold and given to said W. W. Thompson he did not and was not permitted to tarry or loiter in said saloon, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Defendants' 2nd Amended Original Answer. Filed Mch. 3rd, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

8 *Plaintiff's 2nd Supplemental Petition.*

Filed Mch. 21, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

In District Court of Hamilton County, Texas, February Term, 1904.

To Hon. N. R. Lindsey, Judge of said Court:

Now comes plaintiff and files this his second supplemental petition, leave of Court having been first had and obtained, and replying to the defendants' second Amended Original Answer says and alleges as follows:

First:—Plaintiff demurs generally to the defendants' said answer and says that same is insufficient in law and affords no defense to the cause of action pleaded by the plaintiff and of this he prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for Plaintiff.

Second:—The Plaintiff specially excepts to paragraph No. 6, of the defendants' answer and says that same is insufficient in law in this: That a belief based upon good ground, that W. W. Thompson was of age at the date of the alleged entry and remaining would not constitute a defense to the charge in plaintiff's petition for permitting the minor to enter and remain in such place of business, and this though the entering and remaining may have been but an incident to and a part of sales of intoxicants made to the minor, and because the only defense avail- to said charge is set up in paragraph 7, of said answer.

Wherefore, plaintiff prays that all of said paragraph No. 6 be stricken out.

MAIN & CHESLEY.
Attorneys for the Plaintiff.

Third:—Further replying to said answer the plaintiff denies all and singular the allegations in the defendants' answer contained and of this he puts himself upon the country and prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for the Plaintiff.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Pl'ff's 2nd Supplemental Petition. Filed 21 day of Mch. 1904. R. C. Cornelius, Clerk Dist. Court, Hamitlton Co. Texas.

9 *Statement of Facts.*

Filed Apr. 12th, 1904.

In the District Court, Hamilton County, Texas, February Term, A. D. 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Be it remembered that on the trial of the above numbered and entitled cause in the District Court of Hamilton County Texas the following evidence was introduced and none other towit:

The plaintiff offered and read in evidence the following application for license and the following bond, towit:

Application for License for the Sale of Spirituous, Vinous or Malt Liquors or Medicated Bitters.

STATE OF TEXAS, *County of Hamilton, ss:*

We, the undersigned hereby make application for license for the sale of spirituous, vinous or malt liquors or medicated bitters in quantities of one gallon or less to be drunk on the premises; and having been sworn declare that on the 24th day of May 1902, we intend to engage in the sale of such liquors, in the quantities and in the manner above applied for, at No. — J. A. Gamble building, in the town of Hico County of Hamilton, and part of lots No. 11 and 12 in block No. 3 division one.

(Sign-) P. O. COX.

Sworn to before me this 22 day of May 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton Co., Tex.,
By J. T. DEMPSTER, *Deputy.*

Liquor Dealer's Bond.

Liquor Dealer's Bond, Offered in Evidence by Plaintiff.

THE STATE OF TEXAS, *County of Hamilton:*

Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication, to be drunk on the premises, in quantities of one gallon or less at ——, in the town of Hico, in the County of Hamilton State of Texas, and has made the application and paid the taxes required by law.

Therefore know all men by these presents, that we P. O. Cox & Co, as principal-, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally:

Conditioned, that the said P. O. Cox & Co. principal-, shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that they or their agent or employé, will not sell nor permit to be sold in their house, or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication, to any person under the age of twenty one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May 1892.

P. O. COX.
SAM LEVY.
W. M. EVANS.

Examined and approved May 22nd 1902.

J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

2—267

THE STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of County Court in and for said County of Tarrant, do hereby certify that Sam Levy and W. M. Evans, whose names appear signed to the annexed bond are in my opinion good and ample security for the amounts therein specified. That Sam Levy and W. M. Evans have property in said County subject to execution of a larger amount, and that if said bond was offered me for approval, the same would be accepted and approved.

11 To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this the 21st day of May, A. D. 1902.

(Signed) W. E. BUTLER,

[SEAL.] *Clerk of the County Court, Tarrant County, Texas.*

By WALTER G. KING, *Deputy.*

THE STATE OF TEXAS, *County of Hamilton:*

Before me F. C. Williams, Clerk of the County Court in and for said County and State on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22 day of May A. D. 1902.

[SEAL.] F. C. WILLIAMS,

Co. Clerk Hamilton County, Texas.

Filed for record, May 22, 1902.

F. C. WILLIAMS, *C. C. C. H. Co.*

THE STATE OF TEXAS, *County of Hamilton:*

I, F. C. Williams, Clerk of the County Court in and for said County, do hereby certify that the foregoing instrument of writing dated the 21st day of May A. D. 1902, with its certificate of Authentication, was filed for record in my office, on the 22 day of May, A. D. 1902, at 2 o'clock, P. M. in the Bond Records of said County in Book "I" on page 24.

Given under my hand and seal of office, at Hamilton the day and year last above written.

[SEAL.] F. C. WILLIAMS,

Clerk County Court, Hamilton County, Texas.

By J. T. DEMPSTER, *Deputy.*

Testimony of W. B. Thompson.

W. B. THOMPSON, a witness for plaintiff, duly sworn, testified:

My name is W. B. Thompson, I live in Erath County Texas about nine miles north of Hico Texas. I have been in the County for

about twenty seven years. I am plaintiff in the suit cause #1335,—W. B. Thompson *v.* P. O. Cox *et al.* I am the Father of W. W. Thompson. On the morning of May 30th 1902, my son W. W. Thompson left home stating that he was going to Hico. At that time he was about eighteen years and six months old. He was born November 30" 1883. I never did give my consent to P. O. Cox or any of his agents or employes to sell or give my son W. W. Thompson liquor. I did not know that there was such a man as P. O. Cox. I never did give my consent to P. O. Cox or any of his agent- or
12 employes to sell or give my son W. W. Thompson any drinks of any kind,—or any one else. I never gave my consent to P. O. Cox or any of his agents or employes to permit my son W. W. Thompson to enter and remain in his place of business.

Cross-examined by DEFENDANT:

I have lived in Erath County for about twenty seven years. My son, W. W. Thompson, was born on November 30" 1883,—that is what the record shows. Yes it was May 30" 1902 that he left with the statement that he was going to Hico. I remember it was the 30" of May because I went to Hico the next day myself and Mr. Connolly saw me there and asked me how old the boy was and I told him I did not think he was eighteen years old then and then he told me what had happened, and after I went home we talked about it and I remember it was the 30", because I have a clock that tells the day of the month, and I looked at it. the boy left the house that morning pretty early,—I suppose the sun was about an hour or an hour and a half high,—it was tolerable soon after breakfast. I did not send him to Hico,—I did not know anything about it until he started, and he then said he was going to Hico to get him a saddle. He was staying at house then. I do not remember how long at that time he had been staying at my house then. He had worked there a few days and if I did not have anything for him to do he would go somewhere else and work. Prior to that time he had worked some for my son in law. When I did not have any thing for him to do he went where he pleased and hired to whom he pleased. He never asked me about who he should hire to. He would often tell me that he was going to work for such and such a person. Sometimes he might ask me and sometimes he might not,—if I did not have anything particular for him to do he wouldn't. When he worked for other people I never had anything to do with his wages,—he always kept the money himself. On the morning of May 30" 1902, I heard him at the breakfast table or soon after say that he was going to Hico,—he said he was going to Hico to get him a saddle. I was out about the lot when he left that morning. Yes I testified in a former trial of this case. I only know where he went by what he said,—he said he was going to Hico, and I never saw him any more that day. No I did not ever give my consent for him to go
13 into Cox's saloon,—I did not know Cox had a saloon. No I did not at that time — that there were saloons in Hico,—I was there some time before that and some one told me that they were going to put in saloons again there. The next time after the boy

went to town that I saw him was the next morning about nine o'clock. I had started to Hico and I met him about three miles this side of my house,—he went on home and I came on to town. I think I instituted this suit about the middle of June following. I have not paid any of the costs of this suit yet. I cannot tell you who is paying the costs of this suit. There is a right smart of what is recovered in this suit that I will get. I will get about half of the recovery. My son is living with me now,—he has been there off and on ever since the last trial of this suit. He has worked a little away from home since then. He has been at home about three fourths of the time since then. He worked for Mr. Salmon, his brother in law some, and he picked cotton for several people there in the community,—sometimes a day or two and sometimes as much as a week, and sometimes I did not know where he was. Prior to May 30" 1902, I had seen empty bottles lying around the buggy shed and while I did not absolutely know it, yet I was satisfied that the boy had been getting whiskey some where. Yes, I have talked to him about it. I just asked him who put them bottles there, and sometimes he would say he did not know, and sometimes when I would ask him where he got the whiskey he would say "well I got it all the same." I asked several boys around there and they said that they did not know anything about him drinking whiskey,—that they never got him any or saw him get any. I had been finding bottles for a year or so back prior to May 30" 1902,—I would find half pint bottles and sometimes pint bottles. I had another boy older than this one, but he never got any whiskey. I never found very many bottles,—when he would go off to town and come back I would find bottles. Yes in February 1901 he brought some whiskey to the house that I had sent him for,—that was the time we had the measles there and I sent him to town to get some whiskey. I told him to go to Bill Dawson. I told him I wanted him to go to town that day and get half a gallon of good whiskey. I told him to go to Bill Dawson and get half a gallon of good whiskey, and told him while he was getting his horse ready I would write an order for it, and he said "I can get the whiskey without any order,—
14 I do not want any order," and he went and got his horse and went off without the order. I told him Dawson would not let him have it, and tried to get him to take the order because I did not think he could get the whiskey without it, and I did not want him to ride up there and back for nothing. He went off without the order anyhow. I would have gone myself but I was not well enough. Yes I told him to go to Bill Dawson, and I knew Bill Dawson was a saloon keeper. The reason I wanted to send the order was that I knew it was against the law to sell minors whiskey.

Re-examined by the PLAINTIFF:

Bill Dawson lived at Stephenville,—he did not live at Hico. That is the only time I ever sent the boy after whiskey. Yes my family was sick with the measles then.

Cross-examined by DEFENDANT:

I did not send to a saloon,—I told him to go to Bill Dawson, and tell him to send me the whiskey. Yes I knew he would have to go into a saloon to get it,—but I have went to saloons many times and got whiskey and never went in the house. I did not study much about whether he would have to go in and get it or would get it from the outside. I just told him to go to Bill Dawson and get the whiskey,—I wanted him to take the order to get it,—I had no idea that he would bring back the whiskey because he did not take the order. Yes I permitted him to ride up there which was twelve miles without the order.

Testimony of W. W. Thompson.

W. W. THOMPSON, a witness for plaintiff, being duly sworn, testified:—I am a son of W. B. Thompson. I am now past twenty years old. I will be twenty one years old the 20" day of this coming November. I know the year I was born. I was born in 1884. Yes I believe it was 1884. Yes I am certain of that. I am twenty past,—I will be twenty one on the 20" of this coming November. In 1902 I was eighteen past. I know P. O. Cox. I do not know where he is now. I knew him when he lived at Hico. He run a saloon there. Yes I have been in his place of business. I was there on May 30" 1902. I was in there several times that day. I was in there some six or eight times that I remember of being in there. I purchased whiskey and beer while I was in there. I paid for it. I remember the first time I was in there that day. The first time I was in there that day another fellow named McFadden went in with me and we bought two toddies. We paid 10 cts. each for them. I paid for them. I drank mine. That fellow May was the bar tender. The toddies were made out of whiskey. No one objected to my coming in there. No one asked me to leave. The first time I stayed in there some ten or fifteen minutes,—maybe twenty minutes. Fifteen minutes anyhow. I talked around there a while,—there were a lot of fellows sitting in there on beer kegs and I talked to them. After we drank the whiskey we stayed around in there awhile and then drank a small bottle of beer apiece, before going out. Then we *we* went out and knocked around town awhile and then went back in the saloon. The same fellow was with me the second time that was with me the first time. I think that fellow is in California now. The second time we were in there we bought beer. I think it was keg beer,—I know it was. I paid a nick*le* a glass for it. Mr. Cox waited on us that time. Mays waited on us the first time. I do not know exactly the time we stayed in there that time,—about five minutes. We stayed in there some five minutes,—maybe ten. This time we had to wait a right smart little bit before they got our drinks ready,—there were a whole lot of men in there and they had to be waited on. I think we went out immediately that time after we drank. We went to the laundry. I was back in there after that again. I reckon we were gone down to the laundry about half an hour before we went back into the saloon. Yes this

same man went back in there with me the third time. I bought beer when I went in there. I paid a nickle a glass for it. This time I stayed in there about half an hour I reckon. I stood up some and sit down some. There was no one that time presented a written order to me to sign. I think after that they did,—I do not remember very much about the statement. The reason I do not remember about the statement much is that I was drunk. I do not know the number of times I drank before the statement was secured. I do not remember having a conversation with Mr. Cox that day until he come around with that paper,—I would not sign it until I got too drunk and then he got me to sign it then. I never signed it when he first brought it to me. While I was in there that half hour I drank as many as half a dozen times. After I went out this time I
15 think I went back again. I bought a saddle that day. I do not remember starting home. I bought a couple or three bottles of beer before I left some time and put it in my saddle pockets. I did that a right smart while before I started home. I do not know what I did with that bottled beer. I do not remember what time of the day it was when I left for home. I got home next day about twelve o'clock. I stayed on the road part of the night, and I stayed the rest of the night at my sister's house. She lived about four miles from my father's place,—on this side. I do not remember how long I had been in the saloon at the time they got me to sign that statement. I had been drinking all along before I signed the statement. The first thing that was said about age, Mays, the bar-tender, says "are you boys twenty one years old," and we told him we reckoned we were, and there was nothing else said about it at all until Cox come around with that paper. Cox never did ask us if we were twenty one years old. He brought the paper around to me and said some men were cutting up out there on the outside about it, and said if I would sign the paper it would save him. Up to the time I took the bottle beer out and put it in my saddle pockets I had been in the saloon three or four times,—maybe more,—I would not be positive about it.

Cross-examined by the DEFENDANTS:

Yes I say I was born in 1884. Yes I think that is my birth year. Before this day I had seen P. O. Cox there around Hico a time or two. I had not been in his saloon before that day. No I do not think that I had taken whiskey home very often and left bottles lying around my father's premises. Yes I might have left bottles around there,—I do not know as I left anything around the place. Yes I have carried whiskey home. I did not leave bottles lying around the premises,—my father sent me to Stephenville once after some whiskey. I do not know as I ever left bottles that I had used the whiskey out of laying around my father's premises. No I had never left any empty bottles about the stable or lying around where my father could find them. My father has got after me a time or two about drinking whiskey. I do not know that he had found any bottles I had laid around. I do not know as I left any bottles lying around the premises. This morning I left for Hico,—I left

home about between nine and ten o'clock and went straight
17 on to Hico. It was about eight and a half or nine miles to Hico. It took me about an hour and a half to make the trip. When I got to Hico I knocked around over town until I met up with McFadden. He was a man that used to live up close to Clairette,—I think he is in California now,—I am not for certain about that. He left this country last September. I met him along about Stovall's building somewhere. I do not know how we come to go to the saloon,—we just walked up there. I do not remember which one of us proposed going up there. We did go up to the saloon, and both went in at the same time. I did not state anything to him about me not being twenty one years old. The bar tender asked us if we were twenty one years old, and we told him we reckoned we were. Yes I remember*ing* swearing here on a former trial of this case. Q. Do you remember stating that it was about eleven o'clock when you went in there and "the bar tender when we walked up asked us if we were twenty one years old, and we told him we were. I told him I was twenty one years old." Did you state that? A. I made some statement about it. Q. You did tell him you were twenty one years old didn't you? A. We told him we reckoned we were twenty one. I told him I reckoned I was twenty one. Q. Did you not testify directly before that you told him you were twenty one years old? A. I do not know. Q. Do you remember? A. I do not remember much about it. Q. Did you tell him or not that you were twenty one years old? A. I never told him for certain I was twenty one. I told him I reckoned I was twenty one. That was all there was said and I never paid much attention to it. McFadden did not say anything about it. The bar tender just says are you boys twenty one years old, and we both spoke at the same time and said we reckoned we were That was about all that was said about it. There was nothing else that I remember of said about it. No I was not then twenty one years old. I do not know as I had been in other saloons and told them that I was twenty one years old. I do not know as I have told other bar tenders that I was twenty one years old. I did not tell any other bar tenders I was twenty one years old. It did not take any time at all when the bar tender was asking us about our age.

Yes there were others in the saloon at the time. I do not
18 think there was any one else buying drinks right where we were,—there were some down towards where Mr. Cox was at the far end, and he was opening up a keg of beer. Yes he could see us. I took a toddy. It does not take very long to fix the toddy. Yes he had to get out glasses and fix it,—I guess it took him about a minute to do that,—I was not timing him. Yes he had to get the glasses and water and set out the bottles with the whiskey in it. Then we drank the toddies and I paid him. I do not remember whether I paid him with the exact change, or whether he had to make change for us? I paid him ten cents for each of the drinks. I do not know that they were selling such drinks at a bit, or two *of* a quarter,—they sold them to me at ten cents each. After we drank the whiskey we stayed around in there a little bit. We

stayed in there some ten or fifteen minutes. No I can't tell how much time was taken up in getting the drinks ready, and drinking them, and making the change and paying for the drinks,—just a short time though. I do not know that I testified on a former trial of this case that I paid for the drinks, the price was ten cents, I paid twenty cents for both, and then we went out and knocked around,—that we immediately went out,—I do not remember that. No I will not say that I did not testify that way. I did not go immediately out after that. When we first went in we taken a drink apiece,—I did not drink any more right then,—we stayed there in the saloon a little bit and then took some more. We were there in the saloon talking, to first one and then another. I think Tom Lane was one of the parties in there. I think we stood up around in there. I do not remember whether or not there — chairs in the saloon. We stood on the floor to do our talking. We were back some two or three steps from the counter. I do not know what the bar tender was doing while we were doing this. I do not know whether he saw us or not after we left the bar. He seen us when we come back up to the bar. He could have seen us there while we were away from the bar. No I could not swear that he saw us while we were away from the bar. There were several in there talking at the time. I reckon there was a dozen persons in the room at the time besides me and McFadden. I do not believe I can remember the names of any of them except Tom Laney,—I had seen all of them before, but I did not know their names. The first time I was in the saloon I took one drink of whiskey when I first
19 went in and then I took a drink of beer before I went out.

I did not testify on the former trial that I only drank the whiskey and went out. I did not testify to any such thing. I testified then that I took two drinks the first time. Yes the whole time I was in there was not over about fifteen minutes. After we took the second drink we knocked around town for a little while,—I do not remember every place we went to. We went around by Stovall's building and then around by Phillip's. There we looked at some saddles. I did not buy one then. After we left there we went back to the saloon. We did not go to the laundry that time. It was after I went in the saloon the second time that I went to the laundry. I do not remember whether it was I or McFadden that proposed going back to the saloon. One wanted to go about as bad as the other. I do not remember what all was said when we started back the second time. I did all the paying for the drinks,—he did not have any money. We went in the saloon through the main door on the street. The second time we went in at the main front door,—the same one we went in the first time. I do not remember who we met in there at that time. When we went in there the second time Mr. Cox was waiting on the bar. When we went in there that time it was somewhere about noon,—I do not know the exact time. I had not eat dinner then,—we did not eat any dinner that day. When I first saw Cox he was opening up a keg of beer. The second time we went in there he was behind the bar and got the beer for us. When we went in we told him we wanted a couple

of beers, and he set them out to us and there was no more said. I paid for the beer. I do not know as I walked right straight out,—we stayed in there some little bit. I do not know what we were doing in there. Yes I know I stayed in there,—I know we stayed in there a little bit,—we never stayed in there long the second time. We were just standing around in there,—just like any one else would be. I do not remember who all was in there at that time. Yes there were others besides me and McFadden there, I don't remember who they were. The bar tender, Mays, was also in there,—he was waiting on some of the rest of them. He was behind the bar. They were both waiting on the bar then,—Mays and Cox. When we went in the first time Cox was not waiting on the bar,—he was opening up a keg of beer and Mays was waiting on the bar. I am not for certain whether Cox spoke to me or not. I would say approximately that I stayed in there the second time about five minutes. I was not timing myself. Yes Cox had to draw the beer,—that takes some time of course, but mighty little. Yes he drew the beer from a faucet. I do not know how long it took him to do that,—no it did not take him as much as two minutes. I guess it would take about a minute to do that. No, not a minute to each glass,—a minute to draw both of them. Yes Cox was a one armed man, but he could carry two glasses in one hand. I could not swear that he could draw the two glasses of beer in one minute and could not swear that he couldn't—it took him very little time to do it though. Yes after we drank the beer I had to pay for it. I do not remember whether I had the exact change or whether Cox had to make change for me. Yes if he had to turn around and make change that would take a little time. I do not remember as to the matter of change. We went out that time at the front door and went to the laundry. The Laundry is down close to Weiser's mill, south of where we were. I guess it was about 350 or 400 yards from the saloon. I do not remember who was running the laundry at that time. By this time I was getting a little drunk. Yes I say that I was in the saloon the second time about five minutes. I do not know the exact time we got back to the saloon the next time. I do not remember very much along after the second time I was in the saloon,—no, the third time. Yes it was after I went to the laundry. We stayed at the laundry just a short time,—two or three or four minutes. I just went to get some laundry and pay for it and then I came back. By this time I was becoming intoxicated. I can remember everything very well when I was at the laundry, but still I was tolerably boozy. From the laundry we went back up to the saloon,—yes to Cox's saloon. Yes McFadden went with me. We went into the saloon through the front door. Cox and Mays were in there when we went in. They were behind the bar. I do not remember which one was at the front part of the bar. When we went in there we drank some more beer. We called for it and they set it out and we drank it and paid for it. I called for it and I guess I paid for it. I reckon Cox waited on us that time. I do not know for certain,—seems to me though that he did. Yes I know that we took beer,—keg beer. I do not remember

which one of them drew the beer. I do not remember what was said. I do not know that there was anything said, nothing
21 more than we called for what we wanted and they set it out, and we drank it. No we did not leave then, we stayed in there a good while. We sit down and stood up both, until we got to where I did not know what I was doing,—I got that way before I left that time. I do not know much about what took place after I got that way. There were a lot of beer kegs about the middle of the house, up next to the wall, and we set down on them some. I did know at the time who drew the beer but I have forgotten. The other boy sit down also and there was other men sitting down too. I remember that Charley Dasher and a man named Houck was there. I think we talked to them a little,—I am not for certain. We drank in there several times before we left. No I do not remember how many times we did drink before we left that time. I would say about four times. No I do not remember of getting up from the beer keg where I was sitting and coming up to the counter and calling for the drinks,—I remember it for awhile, but I soon got past remembering. We took the drinks sorter along like. I do not know whether we went back and sit down on the kegs after we took the drinks or not. When we were sitting on the kegs Cox and the bar tender were over behind the bar. I suppose they were waiting on other customers. I never paid much attention to them. I do not know whether they paid much attention to us or not. I do not know as they said anything to me. It was sometime along about that time that Cox brought that paper around there. It was while I was in there that time that I think the paper was first brought to me. I do not know when I signed that paper. Yes I testified before about it. No I did not then say that I knew when I signed it,—I said that I did not know. No I did not say then that I knew everything when I signed it. No I did not say that on the other trial,—for I did not know everything when I signed it. I was there in the saloon when Cox first come to me with that paper,—I do not remember where exactly in the saloon I was. I do not remember whether I was sitting on a keg or not. I was there somewhere about the middle of the saloon as I now remember. I do not know whether I signed it on a desk or on top of a beer keg. Cox told me he wanted me to sign the paper, and said some of them were out there in front cutting up about it, and that it would save
him, and I told him I would not sign it and I never signed it
22 then. I was pretty far along when he brought the paper to me, but I remember telling him the first time that I would not sign it. I do not know what the statement was,—I did not read the paper. Cox did not read it to me. No I did not read anything. He wanted me to sign it and I would not. No I did not know at the time I signed it that I was signing it. The reason I did not want to sign it was because I did not know what it was,—I did not know much about it. I do not know where I went to sign it. Cox first came to me with it when I was somewhere near the middle of the saloon, but I did not sign it then. I told him I would not sign it. I remember telling him that I would not sign it. I do not remember what he said. I do not remember when he came to me again,—I

do not know when I signed the paper. No I can't tell about the hour of the day it was when I signed the statement. I do not know where I was when I signed the paper, whether I was in the saloon or not. I do not know what I did next after I signed it. I got drunk and those fellows got me off home. Some of them told me it was the Gamble boys that got me off home,—I do not remember though who it was. Yes I had drank some before this time at Hico. Yes I had been drunk a time — two before. I bought the bottled beer and put it in my saddle pocket about the third time I was in the saloon. I do not remember which one of the men I bought the bottled beer from. I had not got very drunk when I bought the bottled beer. I do not remember how many bottles I got. I can't say how long that was before I left town and started home. I guess it was about a couple of hours before I left. I do not remember very much between the time I bought the bottle beer and the time I went home. Yes I bought a saddle in town that day. I had been in the saloon a time or two when I bought the saddle. I bought the saddle right after noon. Yes I bought it before I signed this statement. I do not know exactly when I signed the statement, but it was along in the evening some time. I guess I did ride out of town that evening. Yes since that time I have been indicted in Erath County, Texas, for malicious mischief and one thing another. There were several things that they had me charged with up there,—one of your witnesses that you had before was the cause of it. They had us up there for taking some lap robes. Yes I was con-
23 victed in two cases for theft.

Re-examined by the PLAINTIFF:

Yes Mays was waiting on the bar while we were in there. He was behind the bar. He had his hat off. Yes he was waiting on customers while we were in there. Yes He did that in the presence of P. O. Cox. Yes I got down some where on the road that night. I do not know how long I stayed down,—I got over it about ten or eleven o'clock that night. Yes my father had gotten after me for drinking and objected to me drinking.

Cross-examined by the DEFENDANT:

Yes before I went to Hico this time I had worked for other people than my father and received my own wages without consulting my father. Yes I had traded for myself before that. I bought a buggy from A. L. Phillips before that, and paid him part of it, and he took a lien on the buggy for the rest, and I signed my name to the note I owed him. I do not remember whether he took a mortgage on the buggy or not,—it was only for $15.00. Yes I made the trade in my own name and paid him all but fifteen dollars.

Re-examined by the PLAINTIFF:

I had seen Cox in Hico before then. I lived about eight or nine miles from Hico. No I do not know whether Cox ever knew about me working for myself or not.

Cross-examined by DEFENDANTS:

Sometimes I would go to Hico maybe twice a week and again I would not be there for a month. Hico was my trading point. I did not get my mail there.

Testimony of John T. Adams.

JOHN T. ADAMS, a witness for the plaintiff testified as follows:—My name is Jno. T. Adams. I live at Hico, Texas. I have lived in Hamilton County about twenty eight years. I know Mr. Thompson, the plaintiff. I have known him about seven years. I know his son, W. W. Thompson, and have known him about the same time. I have lived in Hico going on nine years. I saw W. W. Thompson in Hico on or about May 30" 1902. The first time I saw him he rode up in front of P. O. Cox's saloon, and got down and went in at the saloon door. At that time I was in the millinery department of Wm. Connolly's store. I suppose I stayed there some fifteen or twenty minutes. I did not see him come out while I was
24 there. During that time I was standing where I could have seen him had he come out at the front door. My attention about that time was called back in the store and I went back in there. I intended staying in the millinery department where I could see until he came out of the saloon, but my attention was called back in the store and I went back there without seeing him come out then. If I remember right it was then about one o'clock,—shortly after I come back from dinner. About half an hour after that I saw him riding up the street, and I went to the front of the Connolly building and called Mr. Welch's attention to him. I called Mr. Welch's attention to his manner of riding up and down the street, and I told Mr. Welch there was a boy under the influence of liquor already since our new saloons come in. I went to the Southeast corner of the building where I could watch him as he went back to the saloon, and he rode up there and got off and went into the saloon again, and Mr. Welch and I stood there and watched him. I think we stood there somewhere in the neighborhood of twenty or thirty minutes. I took out my little book and put the date down in it so that I would not forget it. Yes he rode up and got off his horse, and went into the saloon, and was in there twenty or thirty minutes, and then he come out and got on his horse and rode along in front of Mr. Connolly's grocery store. As he come out of the saloon that time he had two bottles of beer and he put one each in his saddle pockets. I think they were pint beer bottles. Later in the evening I saw the boy again as I went home,—he come out of the saloon door and got on his horse and Mr. Anderson Gamble was helping to get him on and start him towards home. I observed the boy's conduct at that time. It seems to me that any one that had observed the boy's condition would have said at once that he was drunk,—he could not ride straight and his conduct in town would prove to any one that he was drunk. I have known the boy about seven years,—that was two years ago when he was here in Hico on that occasion. Yes at that time I observed the boy with reference to his age. From his

appearance and general conduct of course I would not have taken him to be twenty one years old then. That was the reason I watched him that day, and took out my book and put down the date,—I was satisfied he was under age. The last time I saw him that day was as I went home in the evening.

Cross-examined by DEFENDANTS:

At the time I am speaking of I had been at work for Mr. Connolly about four years. Yes after that I went to see the plaintiff in this suit, and I talked with the old gentleman and with the boy. Yes I talked to the plaintiff with reference to bring- this suit on the liquor dealers' bond. I did not persuade W. B. Thompson to bring this suit. I told him just what I had seen concerning this boy. It was about twelve miles up to where Mr. Thompson lived and I quit my work to go up there and tell him about it. Yes I quit my labor to go out there and do what I considered to be my duty and to help the officers of my County to do their duty. Yes that was to bring this suit. I understand that there could be two cases of it. Yes I understood that this case was to be a civil suit and another a criminal case. No I did not go out there to persuade him to bring a civil suit. I did tell him he could do it. Yes I was working for Mr. Connolly at the time I observed the boy's conduct and put the date of it down. From the first time that I noticed the boy there in Hico, together with the time I watched him and then until I got through with Mr. Chesley, the County Attorney, about the matter, I had taken off about half a day from my work. Yes I put in that time there spying around. As well as I remember the first time in the day I saw the boy was about one o'clock,—it might have been a little before that time, but it was right after I come back from dinner. At that time I had an idea that he was drinking,—he did not show any appearances of being drunk though at that time. The first time on that day I saw him, I saw him ride up and go into the saloon. No when he went in there the first time there was no indication that he was drunk. No as he come out the first time I could not discover any change in him. The first time I saw him I was in the millinery department of Wm. Connolly's store. It was right across the saloon from the street,—I suppose it is about sixty steps between them. No it is not straight across the street—it is kinder catty cornered. I stood there in the door of Connolly's millinery department,—there were some ladies in there and I called Mr. Connolly's attention to it, and we were talking about it. I was not waiting on any customers then.—I had just come in from dinner and I stood there and watched until my attention was called back in the store. I stood there and watched some fifteen or twenty minutes to see if I could see him come out of the saloon. I could not see what the boy did after he entered the front door of the saloon. Yes I think there were back doors to the saloon. Yes there is a side door to the saloon on another street. The boy came out the same way he went in. I do not know whether Cox or any of his bar tenders saw him in the house or not. All I know I saw him enter the *the* front door, and he was out of my sight for at least fifteen or twenty

minutes, for I watched for that purpose. No when he came out of there I could not discover any change in his condition. After he come out he got on his horse and went down in front of Mr. Phillips' and got down and went in, and I am pretty sure that he bought a cow whip. My attention had been called back in the store and after I got through, I went around to the front door and was standing talking to Ed Gamble when he come on down to Phillips' and I think got a cow whip and then come on up in front of the grocery store. Yes I was still watching him. I called Mr. Welch's attention to it, and the boy went to the saloon and went in again and when he did I began to discover then that he was under the influence of whiskey. No his riding before that had not indicated that he was drunk. He got the beer and put it in his saddle pockets the second time I saw him go in there. When he went back the second time I was standing at the Southeast corner of Mr. Connolly's store where I could see up the street. I saw the boy ride up from Phillips' and ride up to the saloon and get down and go in, and when he come out of the saloon the second time he had two bottles of beer; he put one in each of his saddle pockets. Myself and Mr. Welch stayed there twenty or thirty minutes watching him. Yes he was able then to get on his horse himself. He talked a little loud and made a motion to holler, and got on his horse and called Jno. Hill pretty loud and I told Jno. Hill "you ought to try to get Will to go home." He talked to him and we stood and watched him, until he went back in the saloon and then I did not see him any more for a little while, and that was when I went home. He come out of the saloon about that time, and Mr. Gamble talked to him and got him on his horse,
and he went up the road ahead of me in a lope. Yes I knew
27 him well and I knew his father well. The reason I did not interfere with him and keep him out of there was that I preferred the law to attend to such as that. I had no right to go into any man's house and interfere. Yes I saw him around on the street a time or two as I have stated and knew he was getting drunk, but I did not think I was the right man to interfere with him. Yes I simply went from room to room of the Connolly building and out of the streets and watched him. No I did not see any one sell him anything in the saloon. I do not know whether he set down in there or not. Yes he might have walked out of the saloon at the side door. No I could not see in the house. My estimate of the time is just simply an estimate. I am not extraordinarily anxious that the plaintiff should win in this suit,—all I want to see is the right,—and for the law to be carried out. Yes I think it was right for me to take up the time while I was there employed by Mr. Connolly in watching this boy as I did. I asked Mr. Connolly's permission and he granted it. I suppose I must have put in an hour and a half or maybe two hours there that evening watching him. I am satisfied I paid particular attention to the matter there for at least two hours. No I did not go to the boy and say anything to him. Yes I saw Anderson Gamble trying to get him on his horse and get him off home. I never saw the boy there drunk before or since then. Of course I do not know what was in the beer bottles he brought out and put in

his saddle pockets, but I think I know what a beer bottle is. Of course if he had those beer bottles filled up with water I could not have told it from where I was. But I am sure it was beer in them as far as that is concerned,—I did not see or taste it but I am sure it was beer. Yes I am sure it was beer by the looks of it. The first time I saw the boy was right close to one o'clock. When he went out of town it was late in the evening,—I saw him when he was leaving town,—the second time I saw him that evening was between 2:30 and three o'clock. I must have watched him then for twenty or thirty minutes and then he went back into the saloon and when he went in there the last time, I did not see him come out, but I saw his horse several times, and I watched pretty close. When I started home late that evening I saw him come out of the saloon and there were two or three trying to get him to go home, Anderson Gamble was the man that got him started off home. He had been in
28 the saloon a long time that time before he came out. No I did not see him in the saloon. I merely saw him go in and come out. More than that I do not know. That is all that I can testify to,—that I saw him go in and come out as I have stated.

Re-examined by the PLAINTIFF:

At the time I went with Mr. Chesley up to see Mr. Thompson about this matter Mr. Chesley was then County Attorney of Hamilton County. I understood that the State could prosecute a suit about the matter. I went up to Mr. Thompson's with Mr. Chesley and introduced Mr. Chesley to him, and told him that Mr. Chesley was County Attorney, and that I claimed to be a law abiding citizen, and that Mr. Chesley did not know the way up to his house, and I come along with him, and I told him what had happened in Hico about his boy, and told him Mr. Chesley could tell him what the law was about it, and he could do just as he pleased about it, and then I asked the boy several questions in their presence, and left matters with Mr. Thompson and Mr. Chesley I saw the boy on the day he was in Hico go into that saloon three times. The first time I saw him go in when I was in the millinery department of Connolly's store, and Mr. Connolly stood there a good little while watching, and I was there fifteen or twenty minutes. The second time Mr. Welch and I stood at the corner about twenty or thirty minutes watching him, I am sure it was thirty minutes. The third time when I saw him go in I stood there ten or fifteen minutes, and it was not more than an hour or such matter until I started home, and about the time I started home he come out of the saloon.

Cross-examined by the DEFENDANTS:

When I went up there with Mr. Chesley I understood he was going up there to investigate the matter. No Mr. Thompson does not live in this county,—he lives in Erath County. No I did not understand that Mr. Chesley could prosecute Erath County cases, but I went to Erath County with him to see a man who had a case in this county. I was satisfied that there would be two cases brought about it.

Re-examined by the PLAINTIFF:

Yes of course I understood that Mr. Chesley could prosecute any suit that arose in Hamilton County.

Testimony of J. E. Welch.

J. E. WELCH, a witness for the plaintiff testified:—My name is J. E. Welch. I live in Hico, Texas and have lived there about twelve years. I was there about May 30th 1902. I knew the plaintiff, W. B. Thompson, and his son, W. W. Thompson. I saw him in Hico about May 30th 1902. I saw him on the streets in Hico. When I saw him Mr. J. T. Adams was with me. On that day I saw W. W. Thompson go into P. O. Cox's saloon. Yes I saw him come out of that saloon. From the time he went in there until he come out was about ten or fifteen minutes. At that time I was in Connolly's millinery establishment, I saw him after that. At that time I was in front of Mr. Connolly's house on the corner there. I saw him go back into Cox's saloon that time. Yes I saw him come out. It was about twenty five or thirty minutes from the time he went in until he come out. I saw him again after that. I saw him get on his horse and ride in front of Mr. Connolly's store. I observed his saddle pockets then, he had two bottles in them. They were round bottles. He brought the bottles out of the saloon with him and put them in his saddle pockets, and after that I saw them in the saddle pockets. I saw him ride down about in front of Phillip's and then I did not see him any more. Yes I observed his general appearance at the times I have stated. I observed his size and conduct. From my observation of him I would not have taken him to be twenty one years old at the time. I had not seen him before that day.

Cross-examined by DEFENDANTS:

It was along about two or three o'clock in the day when I first saw this boy. Yes Jno. Adams and myself were in Connolly's millinery establishment. John Adams first called my attention to the young man. There was nothing unusual then in his appearance only going into the saloon. No I could not and did not see him after he entered the door. No I do not know whether he saw any one or any one saw him inside the saloon or not. It was about ten or fifteen minutes before he came out. No I do not know what was being carried on in the saloon at that time. No I could not see whether he bought anything or not after we went in there. I think there is a side door and a back door to that saloon. He could
30 have gone out at either of those doors and me not have seen him. Some little bit after that we were around on the corner by Mr. Connolly's store, and he went in again and we talked about it. I think about half an hour intervened between the first time I saw him come out and the second time I saw him go in. When I first saw him he was walking. I could not say that there was any one with him, for I do not remember. There were several around there. Yes something like a half hour after that I saw him go in

the second time. He was on his horse when he come up that time. I do not remember from what direction he come,—he just rode up and hitched his horse and went in the saloon. There were several people present about the saloon, but I do not remember any of them. Mr. Adams and I were standing about Connolly's corner when we saw him ride up there the second time. The saloon is diagonal across the street from that corner,—I do not know the distance. It was about twenty five or thirty minutes from the time he went in then until we saw him come out. Mr. Adams and I did not do anything during that time only stand there and talk. No I could not see him after he went into the saloon. No I do not know whether he got anything from any one in there or not. No I do not know whether or not he went out the back or side door,—I could not have seen him if he did. All I can say is that I saw him go in the main front door and then saw him come out the same door in about twenty five or thirty minutes. I could not tell from his action when I saw him then whether or not he was under the influence of whiskey,—he was too far from me,—that was the first time, and he was down on the ground going into the saloon. When he come out of the saloon and put the bottles in his saddle pockets he acted like he was drinking, he talked a good deal like a drinking man and when he got on his horse he reeled in his saddle,—he was going on like a drunk- man. Yes I heard him call Jno. Hill. He did not stay there in front of Connolly's store over two or three minutes. He then went towards Mr. Phillip's. I could not tell whether he got off his horse there or not,—I lost sight of him about the time he got down there. I quit watching him, for I thought that I had seen about enough of him. I did not see Anderson Gamble start him home. No if the boy had made a statement in writing to me that he was twenty
31 one years old on that occasion I would not have believed it, he looked to be a boy all the time.

Re-examined by the PLAINTIFF:

When I saw him come out of the saloon he came out the same way that he went in.

Testimony of T. S. McKinley.

T. S. McKINLEY, a witness for the plaintiff testified: I was formerly Sheriff and Tax Collector of this County. I know P. O. Cox, one of the defendants in this suit. I remember the circumstance of this case being tried here before. I had a conversation with P. O. Cox about this case before the first trial I think the conversation occurred in Main & Chesley's office. He made a statement to me with reference to how many times young Thompson had been in his saloon that day before he got him to sign a statement. He said he had been in his saloon three or four times that day before he got him to sign the statement. He said he was in there at least eight or ten times that day.

Plaintiff rests.

Testimony of John May.

JOHN MAY, a witness for the defendants testified:—My name is John May. I live at Comanche Texas. In May 1902, I lived at Hico Texas, and was tending bar for Cox & Co. I remember the circumstance of a young man named Thompson coming into the saloon about the latter part of May 1902, while I was bar tender there. When he first come in I asked him if he was twenty one years old. He said that he was. There was another fellow with him,—I think his name was McFadden. He said yes that is right or something like that. As well as I remember I sold him some beer. From his appearance and from his statement I believed that he was twenty one years old. After he drank the beer he went out. I do not remember at which door he came in or at which one he went out. In a short time he come back again. As well as I remember the same man was with him this time. I believe I asked him again this time if he was twenty one years old, and he claimed he was twenty one the same as he did before. I asked him that once or twice,—I won't be sure about that. Mr. Cox told me not to sell any minor whiskey. After he told me and after the other man told me he was twenty one I believed that he was. I could not say positively how many times he came in
32 there that day,—he came in several times. Later on Mr. Cox drew up a statement and wanted him to sign it and I believe he refused to sign it at first, and later on signed it as well as I remember. In was in the evening some time when Mr. Cox presented him the statement to sign. I did not at any time see him sitting around there. I do not think he sit down while he was in the saloon,—if he did I did not see him. No I can't tell you how many times he come in there that day. I do not remember whether he bought any whiskey that day or not,—he might have drank whiskey part of the time. As well as I remember he carried some bottle beer off with him when he started home,—I think he put it in his saddle pockets. I do not remember how many bottles he had. Yes I had had experience before that as a bar-keeper. From the young man's appearance, demeanor, and looks, and conduct, together with his statement to me that he was twenty one years old, I believed that he was twenty one years old.

Cross-examined by the PLAINTIFF:

I am not doing anything at Comanche now. The reason I asked his age when he come in, was that when a young looking fellow comes in it is natural to ask him his age,—if he is twenty one. I was a little bit suspicious when I first saw him come in. Yes I asked him his age on that account. Yes I believed I asked him if he was twenty one years old the second time he come back. Yes he told me then he was twenty one years old. Yes then Mr. Cox got suspicious and prepared a written statement for him to sign and at first he refused to sign it, but later on signed it. Yes I testified once in this case before. I cannot say how long he stayed in there after he took his first drink,—he did not stay so very long. He stayed there at

the bar a few minutes and was talk- to people in there,—I was busy though and did not pay much attention to him,—but he did not stay in there so very long. No he did not turn immediately around and walk out as soon as he got the drink,—he did not stay there though over three or four minutes. I can't tell you how many times he come in there that day. I guess he was in there as many as four or five different times during the day. Q. Each time he would come in there he would drink and stand around and talk? A. No- every time. Q. Some times he would do that? A. He did not
33 stand around long. I do not remember exactly what I testified before. I am just testifying as near as I can remember it now. Yes the young man did talk to some parties in there. No, I am not certain as to how many times he was in there that day,—he would come in and go out again. At that time I was employed by Cox as a bar tender. Yes young Thompson paid for the drinks. The other fellow that was with him was named McFadden. I believe they kinder taken it time about paying for the drinks. Yes I know that all the drinks were paid for. I am not certain though that Thompson paid for all of them. When Cox got him to sign this statement he had been in there a short time that time, and then Cox went to him with the statement. After he signed that statement I think he went out again. After he signed that statement I do not know whether Cox cared if he stayed in there or not,—I didn't if Cox didn't. After he made the statement if it was al- right with Cox it was al- right with me for him to stay in there. No I did not object to his coming in the house. I did not hear Cox object to it. I did not try to expel him from the house. I did not hear Cox try to expel him. I heard part of the conversation between Cox and Thompson when he got him to sign the statement. I did not hear Cox tell him that there were some people on the outside complaining, and if he would sign the statement it would save him. No I did not hear all the conversation. I was waiting on the bar.

Re-examined by the DEFENDANTS:

Certainly the reason I did not invite Thompson out the first time when he come in, was that he told me he was twenty one years old. Yes that time he stayed there at the bar a few minutes. I do not remember whether he handed me the exact change or whether I had to make change. I do not remember what time in the day it was that Cox asked him to sign this statement,—it was some time in the evening. We sold whiskey drinks there for a bit (12½¢). Once in a while we sold it at 10¢,—if a man would lay down a dime we would take it. I expect we charged Thompson a bit a drink. It was pretty late in the evening when Thompson was in there the last time. I do not remember whether McFadden come back with him each time or not.

Cross-examined by the PLAINTIFF:

He did not get to talking very loud in the house. I do not
34 remember that Mr. Cox went to him and asked him to get quiet. I do not know that he was very full that evening,—I

have seen men lots fuller than he was. I expect he was a little bit full. Yes he was in that condition when he left that evening.

J. A. GAMBLE, a witness for defendants testified:—My name is J. A. Gamble. I live in Hico, Texas. I have lived there for about twelve years. I remember about May 30" 1902 of seeing W. W. Thompson there in Hico in Cox's saloon. I saw him sign a statement in writing that day. That statement you exhibit to me is the statement,—it was signed by me as a witness. Yes Thompson signed that statement. I had just stepped into the saloon and soon after I went in Mr. Thompson come in, and when we walked in he asked me to go & take a drink with him, and I told him alright and we walked to the bar and Mr. Cox called him back from the bar and said a few words to him, and he just turned around and remarked that he did not have to sign anything to get what he wanted to drink, that he could get it without signing anything, and Cox said "well you can't get it here." He said you can't get anything else here, or nothing else here without signing it,—that he did not know that he was twenty one years old, or something to that amount. I think I asked Mr. Cox myself what it was and he said it was a certificate stating the young man's age. I told the boy "if you are twenty one years old, there is nothing wrong in signing the statement, but if you are not I would not sign it." He said "O, hell, if that is all I will sign it, and walked back and signed his name to it, and Cox asked me and Farrow if we would witness it and we did. Thompson then walked back to the bar and we got the drink. He did not stay in there over ten minutes after that, if that long. I do not suppose we were in there over ten minutes, and Thompson then walked out to his horse. He stood there about his horse for some ten or fifteen minutes, and then got on his horse and galloped off up the street and that was the last I saw of him. I observed the young man at the time of the signing of this statement, and from his appearance, demeanor and conduct, I believed him to be over twenty one years old.

35 Cross-examined by the PLAINTIFF:

If he had not signed this statement, I would have just believed that he did not want to sign it. Just looking at the boy I would have taken him to be twenty one years old, independent of the statement. No he did not look to be as much as twenty five years old. Yes he looked young to be in a saloon. He was under the influence of whiskey when I saw him. Yes he was talking pretty loud. We did not talk more than two or three minutes after we drank, and he then went out of the house,—no one took him out. I was there with him before we drank just a few minutes. I was renting the building to Cox then. I did not see the boy on any other occasion in that saloon that day. He and I drank whiskey together. I did not pay for it.

The defendant offered in evidence the following statement:

Statement offered in Evidence by Defendants.

HICO, TEXAS, —— —, 190–.

"M..... To Favorite Saloon, Dr: Fine Wines, Liquors, and Cigars, Keg and Bottle Beer.

This is to certify that I am twenty one years of age, this the thirtyth day of May, 1902.

W. W. THOMPSON.

Witness,
H. FARROW.
J. A. GAMBLE."

Testimony of J. W. Newsome.

J. W. NEWSOME, a witness for defendant testified:—My name is J. W. Newsome. I live at Hico and except for two years have lived here since 1893. I work for Mr. A. L. Phillips. I was acquainted with W. W. Thompson in May 1902. He was in the store that day and we dealt with him. From his manners, appearance, and general demeanor, on that day I would judge him to be twenty one years old. We sold him a buggy before that and he paid part of it and gave his note for the balance.

Cross-examined by PLAINTIFF:

We are very particular about not selling to a boy Yes where we would sell a buggy and get all but $15.00 down we would still be very particular about selling to a boy. No we would not sell to a minor if he was to come in and pay all but $15.00 down,—our rules would not permit it. Mr. Gamble sold him the buggy,—he did not pay all of it but $15.00. He paid $50.00 and the balance was $50.00, and he come in afterwards and paid all of that balance but $15.00 he paid all but $15.00 the day he was in town painting it
36 red. I would take the boy to be twenty two or three years old. Yes I used to be in the saloon business myself. I do not know how old the boy was then. I did not ask him. I am pretty well acquainted in Hico. It seems to me like Cox was there a short time before he went into the saloon business. He come there from Comanche, Texas. No he had not been a resident there. He come there just before he put in the saloon business.

End of the case.

Agreement of Counsel to Statement of Facts.

We, Main & Chesley, Attorneys for the plaintiff, and Dewey Langford, Attorney for the defendants in the above entitled and numbered cause, hereby agree that the above and foregoing is a true and correct statement of the facts proved on the trial of said cause and

respectfully ask that the same be approved and ordered filed as a part of the record in said cause.

MAIN & CHESLEY,
Attorneys for the Plaintiff.
DEWEY LANGFORD,
Attorney for the Defendants, P. O. Cox, Sam Levy and W. M. Evans.

Judge's Approval of Statement of Facts.

I, N. R. Lindsey, Judge of the 52" Judicial District of Texas, certify that I have examined the foregoing approved statement of facts, and that I find same to be correct, and I approve the same and order the same filed as the statement of facts in said cause.

Witness my hand this April 9" 1904.

N. R. LINDSEY,
Judge 52" Judicial District of Texas.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Statement of Facts. Filed Apr. 12th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

General Charge of the Court.

Filed March 22, 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

GENTLEMEN OF THE JURY: In this case the plaintiff W. B. Thompson sues the defendants P. O. Cox, Sam Levy and W. M. Evans to recover statutory penalties for alleged breaches of the defendant P. O. Cox liquor dealer's bond.

The defendants deny all and singular the allegations in plaintiff's petition and plead in addition that if P. O. Cox, his agents
37 or employés ever sold, or gave, or permitted any intoxicating liquors to be sold or given to W. W. Thompson, that the same was sold and given to said Thompson in good faith, with the belief, and having good grounds for said belief, that said W. W. Thompson was twenty one years of age, and if the said W. W. Thompson did enter and remain in the saloon of the said P. O. Cox, said entering and remaining was for the purpose of procuring intoxicants and that he, the said W. W. Thompson remained in said saloon no longer than was reasonably necessary to procure said intoxicants, which was sold to him by P. O. Cox, his agents and employés in good faith,

they believing and having good grounds to believe that said W. W. Thompson was above the age of twenty one years.

Now, if you believe from a preponderance of the evidence, that the defendant P. O. Cox, on or about the time alleged in plaintiff's petition, procured a license and executed and filed the bond in evidence before you and that thereafter he engaged in the business of a retail dealer under said license and bond in Hico, Hamilton County, Texas, as alleged in plaintiff's petition, and if you further believe from a preponderance of the evidence that on or about the 30th of May 1902, and while the defendant P. O. Cox was so engaged as a retail liquor dealer under said license and bond, in Hico, Hamilton County, Texas, (if he was so engaged) the said defendant P. O. Cox, his agents or employés knowingly permitted W. W. Thompson to enter and remain in his house or place for selling spirituous liquors, and if you further believe from a preponderance of the evidence, that the said W. W. Thompson was then and there a person under the age of twenty one years and that the plaintiff, W. B. Thompson is his father and that the said W. B. Thompson did not consent for the said W. W. Thompson to enter and remain in said defendant Cox's house wherein said Cox conducted the business of a retail liquor dealer (if he did so) then you will find for the plaintiff under paragraph 3 of his petition and assess his damages at five hundred dollars for each time you find that said W. W. Thompson was so permitted to enter and remain in said house, not to exceed the number of times alleged in said paragraph 3 of plaintiff- petition.

If you do not so find from the evidence you will find for the defendants, on the issue of W. W. Thompson entering and re-
38 maining in said house or place of business as alleged in paragraph 3 of said petition, and in this connection you are further instructed: If you believe and find from the evidence that the said W. W. Thompson was, on the 30th day of May, 1902 a person under the age of twenty one years, and that the said W. B. Thompson, plaintiff herein is his father, and that the said W. W. Thompson was on or about the said 30th day of May, 1902 permitted by the defendant P. O. Cox, his agents or employés, to enter and remain in the saloon or place of business of the said P. O. Cox, as alleged by plaintiff, but if you further believe and find from the evidence that the said W. W. Thompson entered said saloon for the purpose of procuring intoxicating liquor, and that the said defendant P. O. Cox, his agents or employés sold the said W. W. Thompson intoxicating liquors, but at the time said liquor was sold to him the person selling said liquor to the said W. W. Thompson did so in good faith, believing at the time of said sale, if any, that the said W. W. Thompson was then twenty one years of age, and that the person making said sale, if any, then had good grounds to believe that the said W. W. Thompson was twenty one years of age, and if you further believe from the evidence that the said W. W. Thompson on said occasion did not remain in said saloon for a longer time than was reasonably necessary, under the circumstances, to procure said liquor, that is, if the said W. W. Thompson remained in said saloon for such a length of time only as was reasonably necessary for him under the circumstances to purchase the liquor, drink and pay for

the same, you will find for the defendants on the issue of the sa
W. W. Thompson entering and remaining in said saloon; but y
are further instructed in this connection, if you believe and find fr
the evidence that the said W. W. Thompson after entering the sa
saloon of the defendant P. O. Cox (if he did so) loitered or remain
in said saloon, with the knowledge and consent of the said Cox, h
agents or employés for a longer time than was reasonably necessa
under the facts in this case for him to purchase, drink and pay f
the liquor for which he entered, and that he was then under the a
of twenty one years, and that W. B. Thompson is his father and d
not consent to said entry, you will find for the plaintiff, and ass
his damage as hereinbefore directed.

Upon the issue of the sale by the defendant P. O. Cox, his agen
or employés of intoxicating liquors to the said W. W. Thompso
you are charged: If you believe and find from the preponde
39 ance of the evidence, in this case that after the defendan
executed the bond in evidence before you, and after the d
fendant P. O. Cox, engaged in the business of a retail liquor deal
under said bond in Hico Hamilton County Texas, if he did so, th
he the said P. O. Cox, his agents or employés sold in the saloon
place of business of the said P. O. Cox, intoxicating liquor to W. W
Thompson on or about the 30th day of May 1902, and that the sa
W. W. Thompson was then and there a person under the age
twenty one years, and that the plaintiff herein W. B. Thompson
the father of the said W. W. Thompson, and that he the said W.
Thompson, plaintiff herein, did not consent to such sale, if any, th
if you so believe you will find for the plaintiff under paragraph 4
his petition, and assess his damage at five hundred dollars for ea
sale, if any, to the said W. W. Thompson, not to exceed the numb
of sales alleged in said paragraph 4 of plaintiff's petition; but in th
connection you are instructed: If you believe from a preponderan
of the evidence that the defendant P. O. Cox, his agents of employ
sold intoxicating liquor to the said W. W. Thompson as alleged i
plaintiff's petition, and that the said W. W. Thompson was then
person under the age of twenty one years, at the date of such sal
if any, but if you further believe from the evidence that the perso
making such sale did so in good faith with the belief that the sa
W. W. Thompson was then twenty one years of age, and you furth
believe from the evidence that such person making such sale, if an
then had good grounds for such belief, you will find for the defen
ants on the issue of sale of intoxicating liquor to said W. W. Thomp
son.

You are further instructed that whiskey and beer are each intox
cating liquors within the meaning of this charge.

If you find for the plaintiff, you will state in your verdict the num
ber of infractions, of the bond, in evidence before you, that you ma
find, and assess plaintiff's damage at five hundred dollars for eac
infraction and you will also state what infractions if any you fin
that is, if for entering and remaining, so state, or if for a sale o
sales so state, or if for each, so state, giving the number in each in
stance, if any, of each infraction.

You, gentlemen, are the exclusive judges of the facts proved, o

the credibility of the witnesses and the weight to be given to the testimony but you are bound to receive the law, from the
40 Court, which is here given to you, and be governed thereby.

N. R. LINDSEY,
Judge 52" Judicial Dist.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* General Charge of the Court. Filed M'ch 22d, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Instruction Asked for Defendants.

Filed M'ch 22", 1904.

In the District Court of Hamilton Co., Texas.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now comes the defendants herein by att'y and ask the Court to charge the jury as follows: You are instructed that under the law making a sale of beer or whiskey to a minor, if any was made, by P. O. Cox, there can be but one infraction of the bond; that is, if P. O. Cox, his agents or employés, sold intoxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond, you could not for the same transaction find that there was a violation also of the condition of the bond for permitting the minor to enter and remain unless you should believe from the evidence that after procuring the whiskey or beer, (if he did so) he then loitered or remained in defendant Cox's saloon or place of business with the knowledge and consent of the said Cox, his agents or employés, for a longer time than was reasonably necessary to procure said whiskey or beer.

N. R. LINDSEY,
Judge 52d Judicial Dist.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Instruction asked for defendants. Filed 22" day of M'ch, 1904. R. C. Cornelius, Clerk Dist. Court Hamilton Co. Texas.

Special Instruction No. 1 Requested by Defendants.

Filed M'ch 22", 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendant herein by attorney and ask the Court to charge the jury as follows: You are instructed that under the law in making a sale of beer or whiskey to the minor, if any was made, by P. O. Cox or his agents or employés, there can be but one infraction of the bond; that is, if P. O. Cox, his agents or employés sold intoxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond you could not for the same transaction find that there was a violation also of the condition of the bond for permitting the minor to enter and remain.

41

DEWEY LANGFORD,
Attorney for the Defendants.

Refused. This charge was given with an addition thereto as will appear in the record.

N. R. LINDSEY, *Judge.*

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Special Instruction No. 1, requested by defendants. Filed 22" day of M'ch, 1904. R. C. Cornelius, Clerk Dist. Court Hamilton Co. Texas.

Verdict and Judgment.

In District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now on this the 21st day of March, 1904, this cause came on to be heard, and the plaintiff appeared in proper person and by attorney; and also came the defendants in person and by attorney and both parties announced ready for trial. Then came on to be heard the exceptions of the defendants, general and special to the plaintiff's petition, and the Court having considered same and having heard

the argument of counsel thereon and being advised as to the law applicable thereto, overruled said general and special exceptions to which action of the Court in overruling same, the defendants in open Court excepted.

The- came on to be heard the plaintiff's general and special exceptions to the defendants' answer and the Court having heard and duly considered same, and the argument thereon, and being advised as to the law, overruled the said plaintiff's exceptions to which action of the Court the plaintiff in open Court excepted; and a jury having been demanded, a jury of twelve (12) men, to wit, J. J. Applewhite and eleven others were duly and legally drawn, sworn and empaneled to try this case and said jury having heard the evidence and the argument of counsel for both plaintiff and the defendants, and having heard read and received the charge of the Court together with the pleadings of the parties, retired to deliberate upon their verdict; and afterwards, to wit, on the 22nd day of March, 1904, returned into open Court the following verdict, which was duly and legally
42 received and filed by the Clerk of this Court, to wit, "We, the jury find for the plaintiff six infractions of the Liquor Dealer's Bond sued on, 3 for sales, 3 for permitting the minor to enter and remain in place of business of d'f't Cox. We assess the damage at Five Hundred Dollars in each case and in the aggregate $3000.00.

J. J. APPLEWHITE, *Foreman.*"

Wherefore, it is the opinion of this Court that in accordance with said verdict of said jury, that the plaintiff, W. B. Thompson, should have and recover of and from the defendants P. O. Cox as principal, and Sam Levy and W. M. Evans as sureties, jointly and severally the sum of $3000.00 and the costs of this suit.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, W. B. Thompson do have and recover of and from the defendants P. O. Cox as principal and Sam Levy and W. M. Evans as sureties, jointly and severally the sum of $3000.00 damages for six infractions of the Liquor Dealer's Bond sued on as found by the verdict of said jury together with 6% interest thereon from this date and for all costs in this behalf incurred, for which let execution issue against the said P. O. Cox, Sam Levy and W. M. Evans, or against either of them.

Defendants' 1st Amended Original Motion for a New Trial.

Filed March 25th, 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants in the above styled and numbered cause by attorney and under leave of Court files this Defendants' 1st Amended Motion for New Trial to take the place of their Original Motion filed herein on to wit, the — day of March 1904, and for amendment Def'ts pray the Court to set aside and hold for naught the verdict of the jury and judgment of the Court thereon rendered on, to wit, the 22nd day of March 1904 and grant them a new trial, for the following reasons.

1st. The Court erred in overruling defendants' demurrer to the effect that the section regulating the sale of liquor and prescribing the tax and penalty is unconstitutional, construed in connection with Art. 5060*i*, in that said Article exempts from the provisions
43 of the statute people engaged in the same business to wit, selling intoxicating liquors provided they sell wines produced from grapes grown in this state by the seller. Because said act regulating the sale of liquor and providing a tax and penalty *is* unconstitutional and repugnant to the 14th Amendment of the Federal Constitution, providing that no State shall deny to any person within its jurisdiction the equal protection of the law. And the effect of said act when construed in connection with Art. 5060*i* is to deny to persons within the jurisdiction of the state of Texas the equal protection of the laws.

2nd. The Court erred in giving to the jury the following paragraph in his charge: "Now if you believe from a preponderance of the evidence that the defendant P. O. Cox on or about the time alleged in plaintiff's petition procured a license and executed and filed the bond in evidence before you and that thereafter he engaged in the business of a retail liquor dealer under said license and bond in Hico Hamilton County Texas as alleged in plaintiff's petition, and if you further believe from a preponderance of the evidence that on or about the 30th of May 1902, and while defendant P. O. Cox was so engaged as a retail liquor dealer under said license and bond, in Hico Hamilton County Texas (if he was so engaged) the said defend*nat* P. O. Cox, his agents or employés knowingly permitted W. W. Thompson to enter and remain in his house or place for selling spirituous liquors, and if you further believe from a preponderance of the evidence, that the said W. W. Thompson was then and there a person under the age of twenty one years, and that the plaintiff

W. B. Thompson is his father and that the said W. B. Thompson did not consent for the said W. W. Thompson to enter or remain in said defendant Cox's house wherein said Cox conducted the business of a retail liquor dealer (if he did so) then you will find for the plaintiff under paragraph three of his petition and assess his damages at five hundred dollars for each time that you find that said W. W. Thompson was so permitted to enter and remain in said house not to exceed the number of times alleged in said paragraph three
44 of plaintiff's petition" "because said charge is defective and misleading in stating to the jury that they would find for plaintiff W. B. Thompson if he did not consent for the said W. W. Thompson to enter or remain in said saloon, instead of stating to the jury that the parent W. B. Thompson must consent for said minor to enter and remain in said saloon. And because it was prejudicial error for the court to refer the jury to paragraph three of plaintiff's petition if they should find for plaintiff and therefrom assess the damages, and because said charge is confused and misleading.

3rd. The court erred in giving to the jury the following charge "And in this connection you are further instructed, if you believe and find from the evidence that the said W. W. Thompson was on the 30th day of May 1902 a person under the age of twenty one years, and that said W. B. Thompson plaintiff herein is his father, and that said W. W. Thompson was on or about the said 30th day of May 1902 permitted by the defendant P. O. Cox, his agents or employés to enter and remain in the saloon or place of business of the said P. O. Cox, as alleged by plaintiff, but if you further believe and find from the evidence that the said W. W. Thompson entered said saloon for the purpose of procuring intoxicating liquor, and that the said defendant P. O. Cox, his agents or employés sold the said W. W. Thompson intoxicating liquors, but at the time sail liquors was sold to him the person selling said liquor to the said W. W. Thompson, did so in good faith believing at the time of said sale, if any, that the said W. W. Thompson was then twenty one years of age, and that the person making said sale, if any, then had good grounds to believe that the said W. W. Thompson was twenty one years of age, and if you further believe from the evidence that the said W. W. Thompson on said occasion did not remain in said saloon for a longer time than was reasonably necessary under the circumstances to procure said liquor, that is if the said W. W. Thompson remained in said saloon for such length of time only as was reasonably necessary for him under the circumstances to purchase the liquor, drink and pay for the same, you will find for the defendant on the issue of the said W. W. Thompson entering and remaining in said saloon, but
45 you are further instructed in this connection, if you believe and find from the evidence that the said W. W. Thompson after entering the said saloon of the defendant P. O. Cox (if he did so) loitered or remained in said saloon with the knowledge and consent of the said Cox, his agents or employés for a longer time then was reasonably necessary, under the facts in this case, for him to purchase, drink and pay for the liquor for which he entered and that he was then and there under the age of twenty one years, and that

W. B. Thompson is his father and did not consent for said entry you will find for the plaintiff, and assess his damages as hereinbefore directed" "because said charge is on the weight of the evidence and attempts to tell the jury what facts will constitute entering and remaining within contemplation of law. And because said charge instructs the jury that if the alleged minor loitered or remained in said saloon with the knowledge and consent of the said Cox his agents or employés for a longer time than was reasonably necessary for him to purchase drink and pay for the liquor that the defendant Cox or his employés would infract the bond when in law if the said minor entered for any legal purpose and remained only so long as was reasonably required by his mission in so entering there would be no infraction of the bond. And because from said charge the jury were probably led to believe that if the minor entered for any purpose other than to purchase intoxicating liquor the law would not excuse the entering and remaining. And because said charge and said paragraph therefore does not fairly present in an affirmative way the defense set up by said defendants.

4th. The Court erred in that part of the Court's charge wherein the jury were referred to paragraph four of plaintiff's petition in the event they should find for the plaintiff and assess the damage for each sale as set out in said paragraph of plaintiff's petition. Because it was the duty of the Court to charge the law applicable to this case without referring specifically to said paragraph or any other particular paragraph of plaintiff's petition said reference to said paragraph was calculated to lead the jury to believe that
46 plaintiff's cause of action as set out in the said paragraph four was supported in the opinion of the Court by the evidence.

5th. The court erred in giving to the jury the following charge "if you find for the plaintiff you will state in your verdict the number of infractions of the bond in evidence before you, that you may find, and assess plaintiff's damage at five hundred dollars for each infraction, and you will also state what infractions, if any, you find that is, if for entering and remaining, so state, or if for a sale or sales so state, or if for each so state giving the number in each instance, if any, of each infraction." Because said charge prescribes a form to find in favor of plaintiff but gives to the jury no form should they find for the defendants and thereby the jury were probably led to believe that the Court thought they should find for the plaintiff. And because said form is incomplete, misleading and in view of the evidence highly prejudicial to the defendants.

6th. The Court erred in refusing to give special instruction No. 1, asked by the defendant and in adding thereto the following clause "Unless you should believe from the evidence that after procuring the whiskey or beer (if he did so) he then loitered or remained in defendant Cox's saloon or place of business with the knowledge and consent of the said Cox, his agents or employés, for a longer time than was reasonably necessary to procure said whiskey or beer." Because said special instruction as requested by the defendants should have been either refused or given without limitation or qualification; and because said special charge as presented by the defendants was the law applicabl to the case.

7th. The Court erred in that part of his charge wherein the jury are instructed "But you are further instructed in this connection, if you believe and find from the evidence that the said W. W. Thompson after entering the said saloon of the defendant P. O. Cox (if he did so) loitered or remained in said saloon with the knowledge and consent of the said Cox his agents or employés for a longer time than was reasonably necessary, under the facts in this case, for him to purchase drink and pay for the liquor for which he entered and etc."

47 Because said charge does not define nor attempt to define the word remain nor does it give the synonyms of said word, but merely repeats said word.

8th. Said charge as a whole is unfair and prejudicial to the defendants because it repeats the penalty that the jury might find against the defendants and because the defense is not clearly stated in any part of said charge.

9th. The verdict of the jury herein is unsupported by the evidence in so far as it finds three infractions of the bond for sales made to the minor because the said minor testified in substance that he stated to the bar tender before purchasing intoxicants of any kind that he was above the age of twenty one years, and the bar tender, John May, states that after said statement was made by the alleged minor he believed that said minor was above the age of twenty one years and so believing sold him whiskey and beer, wherefore defendants say that said verdict in so far as it finds for alleged sales is the result of passion or prejudice on the part of the jury and ought not to be permitted to stand.

Wherefore the defendants pray that said verdict and the judgment thereon rendered be set aside and held for naught and that they be granted a new trial.

DEWEY LANGFORD,
Atorney for Defendants

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Defendant's 1st. Amended Original Motion for New Trial. Filed Mch. 25th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

In District Court of Hamilton County, Texas, February Term, 1904.

Order Overruling Motion for New Trial. Notice of Appeal and 20 Day Order, etc.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

On this the 25th day of March, 1904, came on to be heard and considered the motion of defendants to set aside the verdict and judgment in this case rendered on, to wit, the 22nd day of March,

48 1904, and after hearing the reading of said motion and being advised of the law the same was in all things overruled and

denied by the Court, to which action and ruling of the Court the defendants excepted and in open Court gave notice of appeal to the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas at Austin.

And it is ordered by the Court that the parties herein be granted twenty days after the conclusion of the term to prepare and file Statement of Facts and Bills of Exception.

Supersedeas Bond, Filed Apr. 13, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

In the District Court of Hamilton County, Texas.

Whereas in the above styled and numbered cause, pending in the District Court of Hamilton County, Texas, and at a regular term of said Court, to wit, on the 22nd day of March 1904, the said W. B. Thompson recovered judgment against the said P. O. Cox, Sam Levy and W. M. Evans for the sum of three thousand dollars with interest thereon from the 22nd day of March 1904, at the rate of six per cent. per annum, and all cost of suit (and whereas on the 25th day of March 1904, a motion theretofore filed by the said defendants P. O. Cox, Sam Levy and W. M. Evans praying for a new trial was overruled, to which action of the court the said defendants; P. O. Cox, Sam Levy and W. M. Evans then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin) from which judgment and order the said P. O. Cox, Sam Levy & W. M. Evans have taken an appeal to the Court of Civil Appeals for the Third Supreme Judicial —, at Austin, Texas.

Now, therefore we P. O. Cox, Sam Levy & W. M. Evans as principals and C. J. Swasey and W. J. Hefley as sureties, acknowledge ourselves bound to pay said W. B. Thompson the sum of six thousand and five hundred dollars.

Conditioned that the said P. O. Cox, Sam Levy & W. M. Evans appellants shall prosecute their appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Ap
49 peals shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said Court many award *award* against them.

Witness our hands this 12th day of April, A. D. 1904.

P. O. COX.
SAM LEVY.
W. M. EVANS.
C. J. SWASEY.
W. J. HEFLEY.

STATE OF TEXAS, *County of Tarrant:*

I, Jno. A. Martin, Clerk of the District Court, in and for Tarrant County, do hereby certify that the sureties on the within bond, are in my opinion, good and ample security for amount therein specified, and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Fort Worth, Texas, this 11th day of April, 1904.

[SEAL.]

JNO. A. MARTIN,
Clerk District Court, Tarrant County, Texas.

Approved this the 13th day of April, 1904.

R. C. CORNELIUS,
Dist. Clerk, Hamilton Co., Texas.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Supersedeas Bond. Filed April 13th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Assignment of Error. Filed June 15th, 1905.

In the District Court of Hamilton County, Texas.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants and assign the following errors in the above styled cause.

1. The court erred in its charge to the jury in permitting and directing a recovery in favor of plaintiff on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury in order to find for the plaintiff on any phase of the case presented to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

2. The court erred in the third paragraph of its charge and in the fourth paragraph in so far as it is in connection with the third in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description by inference or otherwise in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

3. The verdict of the jury is contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

4. The Court erred in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor daler in the city of Hico.

5. The court erred in the third paragraph of its charge and in the fourth paragraph in so far as it — in connection with the third in directing a verdict for the plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902, a licensed retail liquor dealer in
51 Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., a retail liquor dealer in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co. yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co.

6. The verdict of the jury is contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons.

7. The Court erred in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption.

8. The court erred in submitting to the jury in its charge continually and with reiteration the issue as to the entry of the said Thompson into the said saloon with or without the consent of some person authorized to give consent, for that the Court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father and had a tendency to cause them to give undue weight to the fact that the entry was made without the consent of the father and had a tendency to cause them to find for the plaintiff upon the issue of the entry and remaining to the injury of the defendant, and said issue which was immaterial and irrelevant was given prominence in the case and there being no dispute as to the facts of the said issue it in its nature must have injuriously affected the case of defendant before the jury.

9th. The Court erred in its charge to the jury wherein the jury is instructed as to the form of their verdict if they found for plaintiff,

in that the charge does not inform the jury as to the form of
2 their verdict if they found for defendants, thereby probably leading the jury to infer or believe that the Court thought that
n no contingency could they find for the defendants.

10. The Court erred in its charge in that the same is contradictory nd confusing and in the nature thereof undoubtedly affected inuriously the case of the defendants, in that in the third paragraph of ts charge it instructs the jury directly to find for the plaintiff on the ssue of entry and remaining if they believed from the preponderance of the evidence that the defendant Cox or his agents knowlingly ermitted W. W. Thompson to enter and remain in his house or aloon wherein he was conducting the business of a retail liquor ealer, if the said Thompson was then and there under the age of wenty one years, this paragraph being short, concise and complete within itself and without qualification. And in the fourth paragraph f the Court's charge which is quite lengthy the Court undertakes in ome measure to avoid the effect of the third paragraph by charging he jury amongst other things that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose f procuring intoxicating liquors and that the same were sold to him nd that the persons selling the same did so in good faith believing im to be twenty-one years of age and having good grounds for uch belief and that the said Thompson did not remain in said aloon for a longer time than was necessary under the circumstances o procure said liquor, that is to purchase drink and pay for same, hat they should find for the defendant but in the same paragraph f the same charge the converse of the proposition is given, making he fourth paragraph of the charge a complete charge in itself upon ll phases of the entry and remaining that could be submitted in his case and making it a complete exposition of the law of the same nless another assignment of error that we make herein should be ell taken, and said fourth paragraph uses no words purporting to ualify the third paragraph. The effect of the two charges is such hat an absolute and positive irreconcilable conflict exists. The third paragraph directs a recovery absolutely without reference to any excuse and the fourth paragraph directs a recovery conditio53 ally and deals with all phases of the situation.

11. The court erred in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants in that same taken as a whole is contradictory and would mislead and confuse the jury.

12. The court erred in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the Court should hold that it was necessary to introduce the license in evidence or make proof that the license was issued.

13. The court erred in its charge in directing a recovery in favor

of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entry must have been lawful and the recovery is permitted solely for unlawful remaining without an unlawful entry.

14. The Court erred in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for a minor to enter and remain in a saloon for a length of time sufficient to purchase a drink and pay for same if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that entry and remaining under such circumstances were not violations of the bond and that no recovery could be had for a remaining after entry under such circumstances.

15. The court erred in that it rendered judgment against the defendants on said bond, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 of Article 14 of the United States Constitution in that it is class legislation
54 and also of Article 3 of the bill of rights of the State of Texas.

16. The court erred in that it rendered judgment upon said bond against the defendants for that same is violative of Section 8 of Article 1 of the Constitution of the United States, same being in restraint of interstate commerce.

17. The court erred in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a satisfactory bond and is more onerous than same could be legally made and is more onerous than is required by law in that same is a joint and several obligation and binds the maker and sureties thereon jointly and severally and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof and could only be a joint bond and not a joint and several bond.

18. The Court erred in that it did not sustain a general demurrer to plaintiff's petition in that the law requiring a bond and imposing penalties on retail liquor dealers requires them to give a bond for the pursuit of their business, but does not require a bond of any other merchant and is therefore violative of the bill of rights of the State of Texas, the sale of intoxicants being legalized in this State.

19. The Court erred in that it overruled defendant's general demurrer to the petition and submitted any question to the jury as to recovering a penalty for no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said State and for which a penalty is affixed by law and there is no statute in this State defining it as an offense for a minor to enter and remain in a saloon and it not being so defined as an offense no penalty can be imposed therefor by requiring the giving of a bond.

20. The Court erred in that it rendered judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors as well as making it a penalty

to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons and is violative of Section 35 Article 3 of the Constitution of the State of Texas in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature under said act had authority to require of a retail liquor dealer.

ORRICK & TERRELL AND
DEWEY LANGFORD,
Att'y- for Def'ts P. O. Cox, Sam Levy & W. M. Evans.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Assignments of error. Filed June 15th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Bill of Costs.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Plaintiff and Defendant, to Officers of Court, Dr. to costs accrued in the above entitled and numbered cause.

Clerk's Fees.

1902.			
June 9.....	Filing Suit		.15
" ".....	Docketing Cause		.20
" ".....	1 Citation & 2 Copies to Tarrant County...		1.75
" ".....	1 Citation to Hamilton Co.....		1.25
" ".....	2 Copies of Petition.....		8.10
Aug. 11.....	Sub. for 1 Witness.....		.25
" 23.....	" " 5 "		.85
" 25.....	Filing Answer		.15
" 27.....	Sub. 1 Witness		.25
Sept. 8.....	" 1 "		.25
" 15.....	" 1 "		.25
" 18.....	3 Witness Certificates.....		1.50
" 17.....	Filing First Supt. Petition.....		.15
" 17.....	" Motion to Cont.....		.15
" 16.....	" " for Cost Bond.....		.15
" 17.....	" 1st. Amd. Orig. Ans.....		.15
" 18.....	" Special Charge		.15
" 18.....	" 2 Special Charges.....		.30
" ".....	" Charge of the Court.....		.15
" 17.....	" 3 Papers		.45
" ".....	Swearing 5 Witness.....		.50
" ".....	" 6 "		.60
" 18.....	Final Judgment		1.00
" 19.....	Judgment Overruling Motion for New Trial.		.75
			19.45

57 Amt. Brat. Ford..... 19.45

1902.

Sept.	16.....	Docketing 1 Motion.....	
"	"	Entering 1 Order	.20
"	"	Docketing 1 Motion.....	.75
Oct.	8.....	Approving Bond	.20
Dec.	1.....	Filing Assignment of Errors.....	1.50
Sept.	28.....	" Statement of Facts.....	.15
"	.....	Entering Appearance	.15
"	.....	Taxing Cost & 1 Copy.....	.30
Oct.	8.....	Filing Appeal Bond	.25
Sept.	19.....	Filing 10 Papers.....	.15
"	19.....	" Motion for New Trial.....	1.50
Dec.	15.....	Transcript of Record.....	.15

1903

Aug.	Term...	1 Cont.	30.10
Feb.	" ...	1 "	.20

1904.

Feb.	24.....	Filing Intgs. to P. O. Cox.....	.20
"	24.....	Cert Copy Intgs. to P. O. Cox.....	.15
"	"	Precept to Serve & Copy.....	1.25
"	26.....	Filing Cross Intgs.....	1.25
"	26.....	Cert. Copy Intgs. to P. O. Cox, D. & X.....	.15
"	26.....	Commission to take Dep. of P. O. Cox.....	4.65
Mch.	3.....	Filing Defts. 2" Amd. Ans.....	.75
"	21.....	" Plffs. 2" Supt. Petition.....	.15
"	21.....	" Motion to Cont.	.15
"	21.....	" 3 Papers	.15
"	21.....	Docketing 1 Motion.....	.45
"	23.....	Filing Motion for New Trial.....	.20
"	25.....	" 1st Amd. Motion for New Trial.....	.15
"	22.....	" 2 Special Chgs.....	.15
"	22.....	" Chg. of Court.....	.30
"	21.....	Swearing 5 Witnessess.....	.15
			.50

58 Amt. Ford. $65.80

Amt. Brot. Ford..... $65.80

1904.

Mch.	—.....	Final Judgment	
"	.....	Judgment Overruling Motion for New Trial.	1.00
"	22.....	4 Witness Certificates.....	.75
"	21.....	Swearing 3 Witnesses.....	2.00
"	21.....	1 Affidavit	.30
Apr.	12.....	Filing State of Facts.....	.50
"	13.....	" and Approving Bond.....	.15
June	15.....	Filing Assignment of Errors.....	1.65
"	17.....	Transcript of Record.....	.15
			36.50

$108.80

Sheriff's Fees.

Serving 2 Citations & Mileage	$1.70
" 1 " "	2.95
" Sub. & Mileage	2.70
" " 5 Wit. & "	2.50
" " 1 " " "	2.70
" " 1	.50
" " 1 " " "	.50
Serving Precept	.75
Jury Fee	.50
Total Sheriff's Fees	$14.80

Witness Fees.

J. T. Adams	$5.64
J. E. Welch	5.64
W. W. Thompson	12.72
J. T. Adams	4.64
J. E. Welch	4.64
Amt. Ford	$33.28
59 Amt. Brot. Ford	33.28
J. A. Gamble	3.64
J. T. Newsome	3.64
	$40.56

"Stenographer's Fee $3.00."

Recapitulation

Clerk's Fees	$108.80
Sheriff's "	14.80
Witness "	40.56
Stenographer's Fee	3.00
Total	$167.16
By Cash By Plff	39.08
Balance	128.00
By Cash By Deft	30.10
Balance	$97.98

Clerk's Certificate to Transcript.

HE STATE OF TEXAS, *County of Hamilton*:

I, R.C.Cornelius, Clerk of the District Court in and for the County Hamilton, do hereby certify that the foregoing 61 pages con- in a true and correct transcript of the record of all the proceedings d in this cause as the same appears of record and now on file in y office.

To certify which witness my hand and seal of this Court this the 17th day of June, A. D. 1904.

[SEAL.] R. C. CORNELIUS,
Clerk of the District Court of Hamilton Co., Texas.

(Endorsed:) No. 3394 P. O. Cox *et al.*, Appellants, *vs.* W. B. Thompson, Appellee, From the District Court of Hamilton County. Applied for by D. Langford Attorney for appellants on the 13 day of April 1904, and delivered to D. Langford on the 17th day of June 1904. R. C. Cornelius, Clerk District Court Hamilton County. Filed in Court of Civil Appeals, at Austin Texas, the 8th day of July 1904. R. H. Connerly, Clerk. Court of Civil Appeals 3rd Supreme Judicial District of Texas.

60 *Opinion of Court of Civil Appeals.*

Opinion.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

Appeal from the District Court of Hamilton County.

Opinion.

This is a suit for the recovery of statutory penalties for breach of a liquor dealer's bond. P. O. Cox is the principal in the bond and the other defendants are sureties. The petition charges that the defendant Cox breached the bond by permitting W. W. Thompson, a minor, to enter and remain in his saloon on three separate occasions. The jury found these allegations true, and returned a verdict for the plaintiff for $3,000. Judgment was entered accordingly and the defendants have appealed. These findings are amply supported by testimony and are not challenged in this court.

The first assignment of error complains of the action of the court authorizing a verdict for the plaintiff upon a preponderance of testomíny the contention being that as this is a penalty suit, the plaintiff rested under the duty of establishing his case beyond a reasonable doubt. It has been repeatedly held in this state that in all civil cases the jury should decide according to the preponderance of the evidence. (Sparks *vs.* Dawson, 47 Tex., 145; Hillingmon *vs.* Rose, 81 Tex., 222; Waters Pierce Oil Co. *vs.* State, 19 Crt. Civ. App. 1.) It seems to us that the rule referred to is particularly applicable in this case, which is an action founded upon the breach of a written contract. The fact that the damages recoverable are fixed in amount by a statutory enactment, and are in fact a penalty, does not change the fact that the suit is based upon a written contract; and, such being the case, we see no reason why the plaintiff should be required to prove a breach of the contract by any higher degree of testimony

n is required in any other suit founded upon a breach of contract.

The third, fourth and sixth assignments assail the verdict upon the theory that there was no proof that P. O. Cox was icensed retail liquor dealer, as alleged by the plaintiff. That obtion was not urged against the verdict in the court below, and for t reason, it cannot be urged here.

Several objections are urged against the charge of the court, none which is regarded as tenable. The charge was quite full, and subtted the case to the jury in as favorable a manner to the defendants they were entitled to have it submitted.

The point is made that P. O. Cox'- application for license to do siness designated two places. The application described the place business as "at No. — J. A. Gamble Building, in the town of Hico, unty of Hamilton, and part of lots No. 11 and 12 in block No. 3, ision one." It does not seem to us that this description necesily embraces two separate places of business. The Gamble buildg may have been located on parts of lots No. 11 and 12, in block . 3, division one. But if appellant's contention is correct, and the scription does include two separate places, it does not follow that e plaintiff was not entitled to recover. In Greene *vs.* Southard, 94 x., 470, it was held that the bond of a liquor dealer is not invalid, d will support a recovery by one aggrieved by its infraction though e license and the application therefor contain no designation of the rticular house in which the business was to be conducted.

Numerous objections are urged against the validity of the statute quiring retail liquor dealers to give bond in the manner prescribed the statute. These have all been considered and are overruled. The st serious of these objections is the one which urges that the statute erred to is obnoxious to the 14th amendment to the Federal Contution, as construed in Connolly *vs.* Union Sewer Pipe Co., 13 p. Crt. Rep. 431. However, since this case was submitted, our preme Court has decided that identical question against the conion of appellants (Douthit *vs.* State, decided Dec. 15, 1904.)

There are some other questions presented in appellants' brief, all of which have received due consideration, and are decided against appellants.

No reversible error has been shown and the judgment is irmed.

W. M. KEY,
Associate Justice.

1-11-05.

(Endorsed:) No. 3394 P. O. Cox *et al.*, Appellants, *vs.* W. B. ompson, Appellee. Appeal from Hamilton County. Opinion. Afmed. W. M. Key, Associate Justice. With App. No. 4586. Filed Court of Civil Appeals 3rd Supreme Judicial District, Austin, xas. Jan. 11, 1905. R. H. Connerly, Clerk. Filed in Supreme urt Mar. 18, 1905. F. T. Connerly Clerk.

Judgment of Court of Civil Appeals.

Judgment of the Court of Civil Appeals.

Rendered January 11th, 1905.

No. 3394.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

Appeal from District Court of Hamilton County.

Opinion by Associate Justice Key.

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the court that there was no error in the judgment: It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, W. B. Thompson, do have and recover of and from the appellants, P. O. Cox, Sam Levy and W. M. Evans, principals, and their sureties C. J. Swasey and W. J. Hefley, the amount adjudged by the court below and all costs in this behalf expended and this decision be certified below for observance.

63 *Motion for Rehearing.*

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

Now come the appellants herein and move the court to grant them a rehearing herein, and respectfully state to the court that as grounds for rehearing these appellants assign the following to-wit:

1. The Court erred in holding that the Fifteenth Assignment of Error was not well taken and in holding that the Court below did not err in rendering judgment against the defendants, the appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1, Article 14 of the United States Constitution in that it is class legislation, and also violative of Article 3 of the Bill of Rights of the State of Texas.

2. The court erred in holding that the First Assignment of Error was not well taken and in holding that the Court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the

recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented, to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

3. The court erred in holding that the Thirteenth Assignment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery in favor of plain-
64 tiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

4. The court erred in holding that the Nineteenth Assignment of Error was not well taken, in that it held that the court below did not err in overruling defendant's general demurrer to the petition and submitted any question to the jury as to recovering a penalty, for no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and there is no statute in this state defining it as an offense for a minor to enter and remain in a saloon, and it not being so defined as an offense, no penalty can be imposed therefor by requiring the giving of a bond.

5. The court erred in holding that the Twentieth Assignment of Error was not well taken, in that it held that the court below did not err in rendering judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors, as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature, under said act, had authority to require of a retail liquor dealer.

6. The court erred in holding that the Fourteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for the minor to enter and remain in the saloon for a length of
65 time sufficient to purchase a drink and pay for the same if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that the entry and remaining — such circumstances were not violations of the bond and that no recovery could be had for the remaining after entry under such circumstances.

7. The court erred in holding that the Second Assignment of Error was not well taken, in that it held that the court below did not err in the third paragraph of its charge and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description, by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

8. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

9. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

66 10. The court erred in holding that the Twelfth Assignment of Error was not well taken in that it held that the Court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

11. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the Court below did not err in the third paragraph of its charge, and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate

that P. O. Cox was doing business under the name of P. O. Cox & Co., and in holding in substance that the question raised by this assignment could not be raised on appeal because not sufficiently made in the court below.

12. The court erred in holding that the Sixth Assignment of Error was not well taken in that it held in substance that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in
67 the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

13. The Court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

14. The court erred in holding that the Seventeenth Assignment of Error was not well taken in that it held that the court below did not err in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a satisfactory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

15. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight
68 to the fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining, to the injury of the defendant, and said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it, in its nature, must have injuriously affected the case of defendants before the jury.

16. The court erred in holding that the Ninth Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury wherein the jury is instructed as to the form of its verdict if it found for plaintiff, in that the charge does not inform the jury as to the form of its verdict if it found for defendants, thereby probably leading the jury to infer or believe that the court thought that in no contingency could it find for the defendants.

17. The court erred in holding that the Tenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in that the same is contradictory and confusing, and in the nature thereof undoubtedly affected injuriously the case of the defendants, in that in the fourth paragraph of its charge it instructs the jury directly to find for the plaintiff on the issue of entry and remaining, if they believed from the preponderance of the evidence that the defendant, Cox, or his agents, permitted W. W. Thompson to enter and remain in his house or saloon, wherein he was conducting the business of a retail liquor dealer, if the said Thompson was then and there under the age of twenty-one years, this paragraph being short, concise and complete within itself and without qualification. And in the fifth paragraph of the court's charge, which is quite lengthy, the court undertakes, in some measure, to avoid the effect of the fourth paragraph by charging the jury, amongst other things, that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose of procuring intoxicating liquors, and that the same were sold to him, and that the persons selling the same did so in good faith, believing him to be twenty-one years of age and having good grounds for such belief, and that said Thompson did not remain in said saloon for a longer time than was necessary, under the circumstances, to procure
69 said liquor, that is, to purchase, drink and pay for same, that it should find for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted in this case, and making it a complete exposition of the law of the same unless another assignment of error that we make herein should be well taken, and said fifth paragraph uses no words purporting to qualify the fourth paragraph. The effect of the two charges is such that an absolute and positive irreconcilable conflict exists. The third paragraph directs a recovery absolutely without reference to any excuse, and the fourth paragraph directs a recovery conditionally, and deals with all phases of the situation.

18. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants, in that same, taken as a whole, is contradictory and would mislead and confuse the jury.

Wherefore for the manifest errors in the judgment of this Honorable Court, the appellants respectfully pray that a rehearing be granted.

And appellants would respectfully state to the court that the attorneys for the appellee herein are Main & Chesley whose post office address is Hamilton in Hamilton County, Texas, and they pray that notice of this motion be duly served on them as required by law, and that on hearing that a rehearing be granted herein as herein prayed by appellants.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) *Mo.* 2104. P. O. Cox *et als. vs.* W. B. Thompson. Appellants' Motion for Rehearing. Overruled. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Jan. 23, 1905. R. H. Connerly, Clerk. Filed in Supreme Court Mar.
70 18, 1905. F. T. Connerly, Clerk. With App. No. 4586.

Order Overruling Motion for Rehearing.

Made February 22nd, 1905.

Motion 2104: No. 3394: P. O. Cox *et al. vs.* W. B. Thompson: Appeal from Hamilton County; Motion for a Rehearing; The Motion is Overruled.

Application for Writ of Error.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

To the Honorable Supreme Court of the State of Texas, sitting at Austin:

Now come the appellants herein and apply to the Honorable Supreme Court of the State of Texas for the issuance of its writ of error to the said Honorable Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, for that said Honorable Court of Civil Appeals in affirming the above styled cause committed manifold errors, which errors were duly called to the attention of said court on motion for rehearing, which said motion was by said court duly overruled. And the appellants herein would respectfully
71 call to the attention of the Honorable Supreme Court and assign as error the action of said Honorable Court of Civil Appeals in the following particulars, to-wit:

1. The court erred in holding that the Fifteenth Assignment of Error was not well taken and in holding that the court below did not

err in rendering judgment against the defendants, the appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 Article 14 of the United States Constitution in that it is class legislation, and also violative of the Bill of Rights of the State of Texas.

In view of the very meager statement of the Court of Civil Appeals and the very short statement of facts that can be made to cover the whole case, we deem it proper for the convenience of the court to make the following short statement of the material facts in the case.

There was absolutely no evidence that P. O. Cox was doing business under the firm name of P. O. Cox & Co., direct, indirect or inferential.

There was absolutely no evidence that P. O. Cox or P. O. Cox & Co. ever obtained a license to retail liquors, either direct, indirect or inferential.

The application was put in evidence and will be refer-ed to under proper assignment.

The bond was introduced. It was the ordinary form of liquor bond, except the place of business is left blank, and was a joint and several obligation, binding the heirs, executors and administrators of the principal and sureties. The plaintiff's evidence showed that, as a matter of fact, Thompson was a minor, and that he did not consent for defendant to sell to his son or to permit his son to enter and remain in the saloon.

That at the time alleged said minor did enter and remain as many as three or more times, and bought drinks and got intoxicated.

The evidence would warrant the conclusion of the jury
72 that the minor loitered some minutes after taking his drinks.

The evidence of the defendants would have warranted a finding by the jury that the drinks were sold in good faith, and would have warranted a finding that his entering and remaining was for the purpose of getting drinks and that he did not loiter.

The evidence is voluminous but we think we have stated enough in our short summary for the court to grasp the case in the beginning, and hence omit all reference to detail and questions of credibility.

We think also that the charge of the court in so far as it is material to the questions involved should be set before the court, and in view of the fact that the said charge is set forth in full on page 4 *et seq.* of the brief, we think it will be much more convenient for the court to read it as there printed than to have it add to the volume of this motion.

We would call the court's attention to our argument upon this proposition on page 42 *et seq.* of our brief in this cause and page 7 of the supplemental brief filed herein, and we feel that in addition to these arguments we ought to make to the court the following additional suggestions by way of argument.

In making this argument we recognize that this court has held in the case of Douthit *vs.* State that the case attempted here to be made is governed by the case of the American Sugar Refining Co. *vs.* Louisiana reported in the 179 U. S. page 99, and that this case is analogous to that and that the case of Connolly *vs.* Union Sewer Pipe Co. reported in the 184 U. S. page 640 does not govern.

Why this is so this honorable court in its opinion did not under-
ake to show.

In view of the fact that we cannot bring ourselves to believe that
n a reconsideration of the question involved that this court will
nally hold the law to be as it did in the Douthit case, we feel con-
rained in this writ of error to make a few suggestions to the court,
oping that these suggestions in addition to the argument made in
ur briefs will present the point to the court in a new light.

In the first place we understand the law is that; by reason
3 of our constitution every man enjoys the right to pursue the
business of a retail liquor dealer as much so as the right to
ell dry goods, where local option has not been put in force in the
nanner authorized by the constitution.

If this were not so, yet nevertheless the Supreme Court of the
Inited States in two cases, to-wit Vance *vs.* W. A. Vandacook Co.,
70 U. S. page 438 and Scott *vs.* McDonald, 165 U. S. 58-107 holds
hat the liquor traffic comes within the domain of trade and com-
nerce and as such is entitled to the protection afforded by the con-
titution of the United States to trade and commerce.

With this preliminary statement, we would call the court's at-
ention to the fact that if a parallel can be drawn between the Sugar
Refining Co. case and this case it would seem that the parallel could
nly be drawn along the lines of the dissenting opinion of Mr.
Justice McKenna in the Connolly case, and he does not undertake to
oint out in any clear manner how the two cases can be parallel,
or does this court in any way whatever point out where the parallel
xists.

The consideration of the Sugar Refining Co. case shows that it was
n act to levy, collect and enforce payment of an annual license tax
n certain persons. That it had in view no other purpose than the
urpose of taxation expressed in its title.

The exemption in that act applied to planters and farmers grind-
ng and refining their own sugar and molasses and those who granu-
ated syrup for other planters during the rolling season. The opinion
n that case makes a distinction which can well be applied in this
ase and so nearly does it touch the identical question here raised,
hat we can truthfully say that were we now attacking our statute
egulating the sale of intoxicating liquors only in so far as its features
elating to taxation are concerned, that the exact question on which
he distinction was made in the Sugar Refining Co. case would exist
ere. The decision in that case says, "The act is not only exempting
lanters who use their sugar in the manufacture of articles of a
holly different description such as confectionery, preserves or pastry
or such as one which would exempt the farmer who devoted
74 his corn or rye to the making of whiskey, while other manu-
facturers of these articles were subject to the tax. A somewhat
ifferent question might arise in such case."

If in our attack upon the act involved in this cause we had no
ther point of distinction between this case and the Sugar Refining
Co. case, we think that a good point would be made, and that the very
oint having been suggested by the Supreme Court of the United

States itself in the very case would be entitled, if not absolutely good, at least to the most careful consideration and that the profession would be entitled to have the reasons why such point did not constitute a good distinction pointed out to it. We know that there is no rule of law requiring this court to give its reasons for any of its decisions, but we believe that long custom and practice by the Judges of this court has established something nearly akin to the rule for which we contend.

Whether the point suggested in the Sugar Refining Co. case is a good one or not, yet the vastness of the distinction between that case and this, in our humble opinion should be at once apparent to an appellate court, unless they follow the reasoning of Justice McKenna to the exclusion of the majority of the Supreme Court of the United States.

In the Sugar Refining Co. case it should be borne in mind that the basic principles upon which that case was decided are two. First, that it was purely a revenue act. Second, that from time out of mind it has been the policy of this government not only to classify for purposes of taxation, but to exempt producers from taxation of the methods employed by them to put their products upon the market.

It should also be borne in mind that that case itself goes on to point out that refined sugar is a national and ultimate product of the cane and the various steps dealt with in the act are merely taken to perfect such product and are but incident to its original growth.

The gist of that decision is contained entirely in the foregoing semi-quotation. Now wherein is it in any way analogous to this case?

75 Here we have an act which is entitled "An act to regulate the sale of spirituous, vinous or malt liquors or medicated bitters, to fix a tax upon all persons or association of persons selling such liquors, to define the time and manner of collecting such tax, to fix penalties for the violations of this act, etc." First, the main purpose of the act is obviously a regulation of the liquor traffic. Second the tax is imposed as an incident or step in the regulation.

In regulating the sale of liquors the most stringent provisions are made, including amongst other things the requiring of a bond such as the bond herein sued on, on which causes of action may arise to the extent of five thousand dollars on penalties, that is fines. This bond, it is useless for us to say, is most burdensome in its provisions and conditions as well as is also the act in many other particulars.

Now the question arises, is an act providing for the regulation of a business in anyway different from an act providing for the imposition of a license tax? It would certainly seem to us that if the answer is not at once plainly apparent, the answer of the Supreme Court of the United States in the Connolly case would forever settle this question.

The Illinois anti-trust act was an act more nearly on a parallel with this case than was the Sugar Refining Co. case, for it regulated and penalized the doing of certain business in certain ways and had an exemption clause almost in exact terms like the exemption clause in our statute, and the language of the Supreme Court of the United

tates in dealing with that anti-trust act is in all of its parts so applicable to the question here presented that we feel that we would do ur client an injustice did we not strongly urge upon this court a econsideration of its expressed idea on the subject in the Douthit ase.

There is in this case absolutely nothing which is similar to the ugar Refining Co. case except that fact that a license tax is in both imposed and that ommitting from our argument the taxation 6 feature as we have not undertaken to attack the statute as unconstitutional in so far as it imposed the tax, we think that he only point of similarity has been entirely eleminated and leaves he two cases, to-wit this case and the Sugar Refining Co. case, absoutely and utterly different cases in principle. If not, we have yet to ee any reason pointed out in any opinion of any court which even ith plausibility undertakes to show wherein the similarity exists.

It had occurred to us that the only two points upon which counsel ould base an argument to sustain the constitutionality of the statute nder consideration were, first, that the liquor traffic did not come ithin the domain of trade and commerce. Second, that the regulaions contained in the act are within the police powers of the state o such an extent that they would not be interferred with by the Federal Courts. Both of these points can be sustained by citation f abundant authorities, and we would approach a submission of his question to this court with great fear as to the ultimate result were it not that upon both questions the Supreme Court of the United States, which is our court of last resort, has spoken in no uncertain terms and in language that cannot be misunderstood.

The South Carolina cases hereinbefore cited absolutely dispose of he first question whatever may be the decision of other courts in the United States or other decisions of the Supreme Court of the United States. The South Carolina cases are the latest utterances on the subject and until overruled constitute the law of the land in so far s an interpretation of the United States Constitution is concerned with reference to what comes within the domain of trade and commerce. Second, the Connolly case deals with the question of police power so clearly that he who runs may read, and in the face of that ase it would unquestionably be far fetched to say that the exception herein complained of by reason of the police powers vested in the state did not bring the statute in conflict with the constitution of these United States.

It may be that we are obtuse in being unable to accept as 77 satisfactory to our minds the decision in the Douthit case, but we have not, and as no reasons were given by this court in that decision for its decision, we are unable to suggest to our minds any satisfactory reason which occurred to the court for holding that that case, to-wit the Douthit case, was governed by the principles decided in the Sugar Refining Co. case.

We submit that as this court in the Shippers Compress Co. case felt bound to follow the Supreme Court of the United States in so far as the imposition of penalties under the anti-trust act was concerned, we would suggest that however much this court may be of opinion that the Connolly case is wrong in principle, which is evidently its

opinion, yet they should accept it as the law of the land and from it as the law they should deduce their conclusions in dealing with cases of this class. We know that vagaries sometime arise where courts accept as law decisions which they believe not to be the law, as for instance our decisions holding that the superior title is in the vendor of land sold on credit, but nevertheless as there, it sometimes becomes necessary for courts to accept those decisions as law which they do not believe to be the law, and we think now that one of these occasions has arisen and that this court should accept the Connolly case as the law and apply the language used in that case to the points raised in this in an endeavor to keep as far as possible the decisions of our state from getting in such lamentable shape that no mind however great can reconcile them.

This is bound to be the result if in great questions like this we are compelled to accept the mere statement of the court that a proposition made comes within the principles decided in *decided in* a certain case, when to our mind it is a matter of utter impossibility to figure out how such a proposition comes within such a case.

We insist so earnestly upon this point because so thoroughly are we convinced that we are right that until the question has been passed upon by the very last court to which it can be taken under the law of the land, we shall not be satisfied and we deem it our duty to present to this court every argument that has occurred to us in
78 order that it may have the same lights before it as the Supreme Court of the United States which must and will ultimately be called upon to decide this question.

2. The court erred in holding that the First Assignment of Error was not well taken and in holding that the court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented, to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

In view of the fact that no statement was made by the Court of Civil Appeals in its opinion, we feel that we should call to the attention of the court the fact that the evidence in the case was highly conflicting. There was no controversy as to this being a fact at any stage of the proceedings in this case.

We would call the court's attention to our argument upon this proposition on page 8 *et seq.* of our brief in this cause and on pages 6 and 7 of our suplemental brief filed herein.

3. The court erred in holding that the Thirteenth Assignment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

We would call the court's attention to our argument upon this proposition on page 20 *et seq.* of our brief in this cause.

4. The court erred in holding that the Second Assignment of Error was not well taken, in that it held that the court below did not err in the third paragraph of its charge and in the fourth
79 paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description, by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

We call the court's attention to our statement and argument upon this proposition on page 12 *et seq.* of our brief in this cause and our general argument on the principle involved in the 4, 5, 6, 7, 8 and 9 Assignments herein on page 1 *et seq.* of our supplemental brief filed herein, as the supplemental brief deals fully with the reply made to our original assignments of error by the appellee in his brief and the ground given by the court as its reason for overruling the assignments.

5. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

We would call the court's attention to our argument upon this proposition on page 14 of our brief in this cause.

6. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under
80 the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

We would call the court's attention to our argument on this proposition on pages 14 and 15 of our brief in this cause.

7. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the court below did not err in the third paragraph of its charge, and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license

is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co., and in holding in substance that the question raised by this assignment could not be raised on appeal because not sufficiently made in the court below.

We would call the court's attention to our argument upon this proposition on pages 25 and 26 of our brief in this cause.

8. The court erred in holding that the Sixth Assignment of Error was not well taken in that it held in substance that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

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We would call the court's attention to our statement and argument upon this proposition on page 26 of our brief in this cause.

9. The court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

We would call the court's attention to our statement and argument upon this proposition on page 26 *et seq.* of our brief in this cause.

10. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration, the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight to the fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining, to the injury of the defendant, and said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it in its nature, must have injuriously affected the case of defendants before the jury.

We would call the court's attention to our statement and argu-

ent upon this proposition on page 16 *et seq.* of our brief in this cause.

11. The court erred in holding that the Ninth Assignment of Error was not well taken in that it held that the court low did not err in its charge to the jury wherein the jury is in-ucted as to the form of its verdict if it found for plaintiff, in that e charge does not inform the jury as to the form of its verdict if found for defendants, thereby probably leading the jury to infer believe that the Court thought that in no contingency could it d for the defendants.

12. The court erred in holding that the Tenth Assignment of ror was not well taken in that it held that the court below did not in its charge in that the same is contradictory and confusing, and the nature thereof undoubtedly affected injuriously the case of e defendants, in that in the fourth paragraph of its charge it in-ucts the jury directly to find for the plaintiff on the issue of entry d remaining, if they believed from the preponderance of the evi-nce that the defendant Cox, or his agents, permitted W. W. Thomp-n to enter and remain in his house or saloon, wherein it was con-ucting the business of a retail liquor dealer, if the said Thompson s then and there under the age of twenty-one years, this paragraph ing short, consise and complete within itself and without quali-ation. And in the fifth paragraph of the court's charge, which quite lengthy, the court undertakes, in some measure, to avoid the fect of the fourth paragraph by charging the jury, amongst other ings, that if the jury believes from the evidence that the said hompson entered the said saloon for the purpose of procuring toxicating liquor, and that the same were sold to him, and that the rsons selling the same did so in good faith, believing him to be enty-one years of age and having good grounds for such belief, d that said Thompson did not remain in said saloon for a longer me than was necessary, under the circumstances, to procure said quor, that is, to purchase, drink and pay for same, that it should d for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted this case, and making it a complete exposition of the law of the me unless another assignment of error that we make herein should well taken, and said fifth paragraph uses no words purporting to ualify the fourth paragraph. The effect of the two charges is such at an absolute and positive irreconcilable conflict exists. The third ragraph directs a recovery absolutely without reference to any cuse, and the fourth paragraph directs a recovery conditionally, d deals with all phases of the situation.

We would call the court's attention to our statement and argu-ent upon this proposition on page 28 *et seq.* of our brief in this use.

13. The court erred in holding that the Twentieth Assignment Error was not well taken, in that it held that the court below did ot err in rendering judgment upon said bond, for that said bond is

void in that same embraces among its conditions the giving of intoxicating liquors, as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature under said act, had authority to require of a retail liquor dealer.

We would call the court's attention to our argument upon this proposition on page 38 of our brief in this cause.

14. The court erred in holding that the Fourteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for the minor to enter and remain in the saloon for a length of time sufficient to purchase a drink and pay for the same if the
84 saloon keeper sells the same in the belief that the minor is twenty-one years of age and has good grounds for such belief, it must result that the legislature contemplated that the entry and remaining under such circumstances were not violations of the bond and that no recovery could be had for the remaining after entry under such circumstances.

We would call the court's attention to our statement and argument upon this proposition on page 20 *et seq.* of our brief in this cause.

15. The court erred in holding that the Nineteenth Assignment of Error was not well taken in that it held that the court below did not err in overruling defendant's general demur-er to the petition and submitted any question to the jury as to recovering a penalty, for no penalty could be recovered or imposed in the state of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and there is no statute in this state defining it as an offense for a minor to enter and remain in a saloon, and it not being so defined as an offense, no penalty can be imposed therefor by requiring the giving of a bond.

We would call the court's attention to our statement and argument upon this proposition on page 35 of our brief in this cause.

16. The court erred in holding that the Twelfth Assignment of Error was not well taken in that it held that the court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

We would call the court's attention to our statement and argument upon this proposition on page 18 *et seq.* of our brief in this cause.

17. The court erred in holding that the Seventeenth Assignment of Error was not well taken in that it held that the court below did not err in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a statutory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

We would call the court's attention to our statement and argument upon this proposition on page 32 *et seq.* of our brief in this cause.

18. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants, in that same, taken as a whole, is contradictory and would mislead and confuse the jury.

We would call the court's attention to our statement and argument upon this proposition on page 54 of our brief in this cause.

And now having pointed out to the court the manifold and manifest errors of the honorable Court of Civil Appeals, appellants pray that the honorable Supreme Court will grant them a writ of error in this cause and reserve and render or remand the cause as to it may seem proper.

Appellants would state that the attorneys for the appellee are Maine & Chesley whose postoffice address is Hamilton, Texas.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) P. O. Cox *et als. vs.* W. B. Thompson. Application for Writ of Error. Refused. Orrick & Terrell Att'ys. App. No. 4586. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Mar. 15, 1905. R. H. Connerly, Clerk. Filed in Supreme Court. March 18, 1905. F. T. Connerly, Clerk. by J. S. Myrick, Deputy.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing 16 pages contain a true and correct copy of the petition for Writ of Error filed in this court by P. O.

Cox, in application No. 4586, P. O. Cox *et als. vs.* W. B. Thompson.

Witness my hand and the seal of said court, this the 10th day of April A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 10, 1905. R. H. Connerly, Clerk.

Judgment of Supreme Court.

In Supreme Court of Texas, 3rd District.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

MARCH 23, 1905.

This day came on to be heard the application of P. O. Cox *et al.* for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said application be refused; that the applicants P. O. Cox, Sam Levy and W. M. Evans and their sureties, W. J. Hefley and C. J. Swasey, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas,
87 hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 8th day of April, A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

(Endorsed:) Application No. 4586 P. O. Cox *et al. vs.* W. B. Thompson. Copy of Judgment in Supreme Court Application for Writ of Error. Refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 8, 1905. R. H. Connerly, Clerk.

Bill of Costs.

Clerk's Office, Supreme Court.

Certified Copy Bill of Costs, Supreme Court.

No. 4586.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

ling Application	.50
ocketing Petition	.50
ntering Appearance of Counsel	.50
ling Two Briefs	.60
ling Three Papers	.90
ntering Orders	.50
ntering Judgment on Application	1.00
rtified Copy of Judgment	1.00
axing Costs of Application	.50
rtified Copy Bill of Costs	1.00
Total	$7.00

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs true and correct.

Witness my hand and seal of said Court, at Austin, this the 8th y of April, 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Application No. 4586. Certified Copy Bill of Costs Supreme Court, Austin. P. O. Cox *et al. vs.* W. B. Thompson. .00. Filed in Court of Civil Appeals 3rd Supreme Judicial Dis- ict, Austin, Texas. Apr. 8, 1905. R. H. Connerly, Clerk.

Petition for Writ of Error.

the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,
vs.
W. B. THOMPSON, Defendant in Error.

the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

Your petitioners, P. O. Cox, Sam Levy and W. M. Evans, re- ectfully show that heretofore to-wit on the 23rd day of March

1904, there was tried in the District Court of Hamilton County, Texas in the town of Hamilton, County of Hamilton, State of Texas, a case in which W. B. Thompson was plaintiff and P. O. Cox, Sam Levy and W. M. Evans were defendants.

The declaration of the plaintiff in said cause was a petition for the recovery of penalties against P. O. Cox as principal and Sam Levy and W. M. Evans as sureties for the violation of the conditions of his bond as a retail liquor dealer, namely in that he allowed
89 W. W. Thompson, the minor son of plaintiff, W. B. Thompson, to enter and remain in his house or place of business for the selling of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, three times on the 30th day of May, 1902. And also for selling & giving to his minor son, W. W. Thompson, intoxicating liquors upon said date and to recover the sum of $500 as a penalty for each time he entered and remained and $500 as a penalty for each sale and gift that was made to him of intoxicating liquors in said place of business for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk upon the premises, a copy of which said law and amendments thereto under which said suit was brought is hereto attached and marked Exhibit A. He also alleged that Cox was a duly licensed dealer and that his bond was given as required by law, said bond being the bond sued on.

Upon the trial of said cause in said city, your petitioners demurred both generally and specially to plaintiff's said petition upon the following grounds amongst others to-wit:

A general demurrer, and also by special demurrer, because the act under which said suit was brought and under which said bond was required to be executed, was unconstitutional and violative of Section I of the Fourteenth Amendment to the Constitution of the United States; because same was class legislation and that it denied to the plaintiffs in error that protection of the laws given to other persons similarly situated in the state; because it deprived plaintiffs in error of their property without due process of law, for that under the statutes of the state of Texas it is provided that no person shall be punished in the state of Texas for any act or omission unless same is made a penal offense and a penalty affixed thereto by the written laws of the state, and the recovery sought to be had was a recovery upon the bond that was a penalty and for an act or omission which was not defined by the statutes of the State of Texas and for the violation of which no penalty was affixed by the laws of the state of Texas; because the provisions of the act cast special burdens and penalties upon those engaged in the sale of wines made from other
90 fruits than grapes and wines made from grapes not grown in the state of Texas and wines made from grapes grown in the state of Texas while not in the hands of the manufacturer or producer thereof, as distinguished from those engaged in the sale of wines made from the grapes grown in Texas while in the hands of the producer or manufacturers thereof; also because said act granted special privileges to the manufacturers of wines made from grapes grown in the state of Texas while in the hands of the manufacturer or producer thereof, as contradistinguished from other people en-

ıged in the handling of wines made from other fruits than grapes rown in the state of Texas while in the hands of the manufacturer r producer thereof, and because said act in requiring such bond and rescribing penalties for the violation of its conditions in effect eprives plaintiffs in error of their property without due process of aw.

Which said demurrer was overruled and the case was tried and subnitted to the jury on the charge of the court, and that thereafter n the 22nd day of March, 1904 a verdict was returned in said cause gainst the defendants finding three infractions of the bond by ntering and remaining and three infractions of the condition of the ond for sales to the said minor son of plaintiff, and assessed the amages at $500 for each entry and remaining and at $500 for each le made to said minor, and judgment was accordingly entered gainst the defendants for $3000 and costs.

And thereupon said defendants who allege and represent to this ourt that they are citizens of the United States and of the State of exas, appealed from the decision of the said court to the Court of ivil Appeals for the Third Supreme Judicial District of the State f Texas, in which court among other things, it was assigned as error hat the court below had erred in overruling defendant- general emurrer to the said petition and in submitting any question to the ury as to the recovering a penalty for violating the conditions of aid bond, for that no penalty could be recovered or imposed in the tate of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and that there was no statute in the state defining it as an offense for a minor to enter and remain in the saloon and no penalty ould be imposed and recovered therefor by requiring the giving f a bond. And also assigned for error that the court erred in giving udgment against the defendants on said bond, for that the law reuiring the giving of the same and giving a recovery thereon is nconstitutional being violative of Section 1 Article 14 of the United tates Constitution, and by appropriate propositions thereunder aised the question of the constitutionality of said act as tested by the onstitution of the United States, Section 1 Article 14 of amendments ereto.

That upon the trial of the said cause in the Court of Civil Appeals or the Third Supreme Judicial District of Texas, the judgment of aid court below was affirmed and the objections urged against the alidity of the statute requiring retail liquor dealers to give bonds n the manner prescribed by the statute were considered and all verruled, and especially the one which urged that the statute reerred to is obnoxious to the Fourteenth *Assignment* of the Federal onstitution as construed in the case of Connolly *vs.* Sewer Pipe Co. y the Supreme Court of the United States. That by said court it as adjudged that the provisions of Chapter A-1 Title CIV of the evised Statutes of the State of Texas and the amendments thereto hapter 158 of the Acts of the Legislature of 1897 of the general aws of said state which made it unlawful for any person to engage n the sale of spirituous, vinous or malt liquors or medicated bitters apable of producing intoxication, to be drunk on the premises, until

he should pay the occupation tax levied under said law and enter into a bond in the sum of five thousand dollars with at least two good, lawful and sufficient sureties payable to the state of Texas, and to be approved by the County Judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication,
92 that such person, firm or association of persons or his agent or employé will not sell or permit to be sold in his or their house or place of business, nor give or permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person under the age of twenty-one years, or to a student of any institution of learning or to any habitual drunkard or to any person after being notified in writing through the sheriff or other peace office- by the wife, mother, daughter or sister of the said person not to sell — such person, and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business, and also further conditions not involved in this case which appears fully from an inspection of the copy of said act which is attached hereto and made a part hereof, and which acts provide a penalty of $500 for the infraction of each of the conditions of said bond.

Article 5060*i* of said act, however, exempts from the provisions of said act persons selling wines manufactured from grapes grown in Texas while in the hands of the manufacturers or producers thereof, was a good and valid law and was not obnoxious to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

That said Court of Civil Apeals in effect held that same was not in conflict with the provisions of Section 1 of the Fourteenth Amendment of the Federal Constitution, in that the provisions of said act did not deprive citizens of the United States and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the State of Texas, nor of liberty or property without due process of law, nor of the equal protection of the law, all of which appears in the record, opinion and final judgment of the said Court of Civil Appeals affirming the judgment of the District Court of Hamilton County, Texas.

Your petitioners represent and show to the court that on the 15-day of March, 1905 a petition for writ of error was filed in the said Court of Civil Appeals to the Supreme Court of the State of Texas, and filed in the Supreme Court March 18th, 1905 in which said petition for writ of error said above mentioned questions were
93 fully raised and discussed, and that the said Supreme Court on the 22nd day of March, 1905 refused to grant your petitioners herein a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. That said judgment of the Court of Civil Appeals thereby became and is a final judgment and is the highest court of the state of Texas at law or in equity in which a decision in said suit could or can be had.

Your petitioners further show that the federal questions were made in said cause in to-wit as hereinbefore set out, and that said questions were also made in the petition for a writ of error to the Supreme Court of the State of Texas, which said writ was refused, and that the said judgment of said Court of Civil Appeals was in favor of the validity of the said law and bond and penalties prescribed thereby hereinbefore referred to, a copy of which law is hereunto attached, in holding that same was not in violation of Section 1 of Article 14 of the Amendments to the Federal Constitution, and that the decision of said question was necessary to the judgment rendered.

Wherefore your petitioners present herewith an exemplified transcript of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in said case and pray that a writ of error to said Court of Civil Appeals for the Third Supreme Judicial District of Texas be allowed, that citation be granted and signed, that the bond herewith presented be approved, that upon compliance with the terms of the statute in such cases made and provided, that said bond and writ of error may operate — a supersedeas and that the errors complained of may be reviewed in the Supreme Court of the United States and that the judgment of said Court of Civil Appeals for the Third Supreme Judicial District of Texas be reversed.

SAM LEVY,
W. M. EVANS,
P. O. COX,
By DEWEY LANGFORD AND
ORRICK & TERRELL,
Attorneys and Counsel for Petitioners.

94 The writ of error as prayed for in the foregoing petition is allowed this 10th day of April, 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Seven Thousand Dollars.

Dated at Austin this 10th day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Filed in my office — day of ——, A. D., 1905.

——— ———,
Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Title CIV. Chapter 1 A.

Revised Statutes of 1895. P. 1024.

Article 5060*a*. Hereafter there shall be collected from every person firm or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, within this state, an annual tax on

each separate establishment as follows: For selling spirituous, vinous, or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon three hundred dollars; provided that in selling one gallon, the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars; provided, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or malt liquors, or medicated bitters on the prescription of a physician, or otherwise, from the payment of the tax herein imposed: provided
95 further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this chapter.

Article 5060*b*. The commissioner's court of the several counties in this state shall have the power to levy and collect from every person or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, a tax equal to one-half the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioner's court of the county in which such city or town is situated.

Article 5060*c*. Every person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous or malt liquors, or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more than one gallon, one gallon or less than one gallon, or whether they desire to sell malt liquors exclusively; and shall also state in said application whether or not said liquors are to be sold to be drunk on the premises and shall pay to the collector of taxes of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or
96 medicated bitters, the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and

the entire annual tax upon such business, as may be levied by the commissioner's court of such county, and file with the county clerk bond as required in article 5060*g* of this chapter. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the state and county tax herein required to be paid, pay to the collector of taxes in such city or town such tax as may be levied on said business by such city or town and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this chapter shall be posted by the licensee in a conspicuous place in his or their place of business, and on failue to so post such license, he or they so failing shall be considered as having no license.

Article 5060*d*. Upon filing the sworn application as provided in article 5060*c*, and paying to the collector the annual state and county tax herein provided for, and filing such bond as is required by article 5060*g*, the county clerk of said county shall issue to said applicant a license to sell spirituous vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing license herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

Article 5060*e*. No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license; provided that if any person or association of persons having a license to sell such liquors, desire to change his or their place of business, such change may be made by presenting the license *ro* the clerk of the county and having the new
97 place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

Article 5060*f*. The county clerk in each and every county in this state shall between the first and tenth day in each month, forward to the state revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the state revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of the tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller.

Article 5060*g*. And person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars, provided, however, that any person, firm or corporation of persons dealing exclusively

in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good lawful, and sufficient sureties, payable to the state of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons, so selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employé, will not sell nor permit to be sold in his or their house or place of business, nor give nor permit to be given any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication to any person under
98 the age of twenty-one years, or to any student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this state to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this state; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the state of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the
99 breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county, a new

ilar bond shall be given and approved before the dealer shall have
right to further pursue the business of a liquor seller; or in case
is pending on any such bond, and the county or district attorney
ll make and file an affidavit with the clerk of the county court
t he believes the bond of the defendant will be exhausted by said
, the clerk shall at once notify the liquor dealer thereof and it
ll be the duty of the liquor dealer, within twenty days from the
e the bond is exhausted, or in other event within 20 days from
time the notice is given, to give a new bond similar to the bond
t given, to be approved in the same way; and until such new bond
iven and approved, when it is required by this chapter, the liquor
er shall not have the right to further pursue the business of selling
uors; and any person, firm or association of persons who shall sell
uors, in any quantity, to be drunk on the premises, without giving
first bond, or the new bond, as required by this chapter, shall
deemed guilty of misdemeanor, and on conviction shall be fined
same amount provided for in cases where no license has been
ained. An open house, on the meaning of this chapter, is one in
ch no screen or other device is used or placed either inside or
side of such house for the purpose of or that will obstruct the view
ough the open door or place of entrance into any such house or
ce where intoxicating liquors are sold to be drunk on the
mises. A quiet house or place of business, in the meaning of this
pter is one in which no music, loud or boisterous talking, yelling
ndecent or vulgar language is allowed, used or practiced, or any
er noise calculated to disturb or annoy any persons residing or
ng business in the vicinity of such house or place of business, or
se passing along the streets or public highways. By an orderly
se is meant one in which no prostitute or lewd woman or women
allowed to enter or remain, and it is further provided, that said
se must not contain any vulgar or obscene pictures. Any surety
such bond may relieve himself from further liability thereon by
giving the principal in said bond notice in writing that he
will no longer remain as surety on said bond and by filing with
the county judge an affidavit that such notice has been given,
if within five days after such notice if he fail to make a new
d, he shall cease to pursue said business until a new bond is given.
d any person who shall continue to pursue said business after such
davit is filed shall be guilty of a misdemeanor, and shall be
ished as provided in cases where no license has been procured;
vided, that where the sale is made in good faith, with the belief
t the minor was of age, and there is good ground for such belief,
t shall be a valid defense to any recovery on such bond.

Art. 5060*h*. An habitual drunkard, within the meaning of this
pter, is one who makes it a habit, or who habitually becomes
oxicated by the voluntary use of intoxicating liquors; and in all
s for the breach of such bond for unlawfully selling to an
bitual drunkard, the question whether or not such person is an
bitual drunkard shall be determined by the court or jury trying
h case, as any other fact.

Art. 5060*i*. The provisions of this chapter shall not apply to wines

produced from grapes grown in this state, while the same is in the hands of producers or manufacturers thereof.

1897. General Laws of Texas. P. 223.
H. B. No. 686.) Chapter 158.

An act to amend the law in regard to taxation, and to regulate the sale of liquor, by amending Article 5060*a* and Article 5060*c* of Title 104, Chapter 1*a* of the Revised Civil Statutes of Texas, and adding Article 5060*j* to said chapter.

Art. 5060*a*. Hereafter there shall be collected from every person, firm, corporation, or association of persons, selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than one gallon, $300; for selling such liquor or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm, corporation, or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so contrued as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise in either locality as above set forth from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which said liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law.

101

Article 5060*c*. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State as set forth in Article 5060*a* of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county on which he or they propose to sell the same, an application under oath, on forms provided by the comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if — any city or town in which streets are named and houses numbered, the street

and number of house shall be given, and the quantities in
02 which he or they propose to sell, whether one gallon or more,
or one gallon and less than one gallon, or whether they desire
sell malt liquors exclusively; provided, in localities where local
ption is in force not more than one quart shall be sold at one time
the same person; and shall also state in said application whether
id liquors or medicated bitters are to be sold to be drunk on the
remises, or to be sold on prescription in a local option county, sub-
ivision of a county, justice precinct, town or city; and shall pay to
ne collector of taxes of the county in which such sales are to be
nade the full amount of the annual tax herein levied, and such as
nay be levied by the commissioner's court of such county and the
ty or town in which sales are to be made; and shall file with the said
erk a bond as required by Articles 5060*g* and 5060*j* of this chapter.
n case the sales are to be made in a city or incorporated town, the
xes by such city or town shall be paid to the collector of taxes of
ich city or town. All taxes herein levied or which may be levied by
county, city or town, shall be paid in advance, and upon the pay
ent of same and full compliance herewith, the county clerk of the
unty shall issue to the person, firm, corporation, or association of
ersons, a license as provided for in Article 5060*d* of this chapter,
hich said license and licenses or receipts for the tax or revenues
sued by the United States shall be posted by licensee in a con-
picuous place in his or their place of business, and on failure to so
ost such license or receipt, he or they so failing shall be considered
having no license and subject to all the pains and penalties as if
o such license had issued.

(Endorsed:) P. O. Cox *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Petition for Writ of Error. Filed n Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 10, 1905. R. H. Connerly, Clerk.

03 *Assignments of Error.*

n the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox, Sam Levy and W. M. Evans, Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Assignments of Error.

Now come the plaintiffs in error, P. O. Cox, Sam Levy and W. M. Evans, and respectfully submit that in the record, proceedings and nal judgment of the Court of Civil Appeals for the Third Supreme udicial District of Texas for the State of Texas in the above entitled natter there is manifest error in this to-wit:

I.

The Court erred in holding that the provisions of Chapter I. A. Title CIV of the Revised Statutes of the State of Texas and of the amendments thereto of the general laws of the state of Texas of 1897, Chapter 158 are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the state of Texas by and through the provisions of said Chapter I. A. Title CIV and the amendments thereto in Chapter 158 of the Acts of 1897 assume to and seek:

(1.) To deprive the plaintiffs in error and certain other citizens of the United States of America and of the state of Texas of rights, privileges and immunities secured to other citizens of the United States and of the said State.

(2.) To deprive plaintiffs in error and other citizens of the United States of their property without due process of law.

(3.) To deprive and to deny to the plaintiffs in error and
104 certain citizens and persons within the jurisdiction of the State of Texas the equal protection of the law.

II.

The Court erred in holding that the provisions of said act do not deny to plaintiffs in error the equal protection of the laws.

III.

The Court erred in holding that the said act and amendments thereto and the authority exercised thereunder and the causes of action given thereby and the penalties imposed thereunder is within the police power of the legislature of the state of Texas, and that the state of Texas has the right to discriminate between persons engaged in the same class of business.

IV.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or in the selling of wines manufactured from other fruits than grapes or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturer or producer thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said act.

V.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt

liquors or medicated bitters capable of producing intoxication, not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

VI.

The Court erred in holding that the provisions of said acts
105 are uniform in their operation throughout the state upon all citizens of the state similarly situated.

VII.

The Court erred in holding that said act does not grant special and exclusive privileges to certain citizens which is denies to plaintiffs in error and to other citizens of the state.

VIII.

The court erred in that it impliedly followed the doctrine laid down in the case of Douthit *vs.* State of Texas decided December 15, 1904 wherein the Supreme Court of this state refused to recognize the doctrine as laid down in the case of Connolly *vs.* Union Sewer Pipe Co., but followed in lieu thereof the doctrine announced in the case of the Louisiana Sugar Refining Co. *vs.* State of Louisiana, the doctrine announced in said latter case being purely upon a question of classification for taxation and was not applicable to the act herein complained of.

IX.

The court erred in holding that the provisions of said chapter and the amendments thereto of the Acts of 1897 are not in violation of Section 8, Article 1 of the Constitution of the United States which confers on Congress the exclusive power to regulate commerce among the several states.

X.

The court erred in holding said laws requiring the giving of said bond by retail dealers in spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, made such bond a valid obligation and that recovery of penalties thereon could be had against the plaintiffs in error, for that it operated to deprive the plaintiffs in error of their property without due process of law, in that the statutes of the State of Texas provide that no person can be punished in the State of Texas for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written laws of this state, for that there is no law in the state of Texas making it a penal offense for a minor to enter and re-
106 main in a saloon and such act not being defined by the laws of the State of Texas as an offense, no penalty could be imposed therefor by requiring the giving of a voluntary bond, the recovery upon said bond being recovered as a penalty.

DEWEY LANGFORD &
ORRICK & TERRELL,
Attorneys for Plaintiffs in Error.

(Endorsed:) P. O. Cox, *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Assignments of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin Texas, Apr., 10, 1905.

Supersedeas Bond.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox ET AL., Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Know all men by these presents: That we, P. O. Cox, W. M. Evans and Sam Levy as principals, and the United States Fidelity & Guaranty Co. of Baltimore, Maryland as surety, are held and firmly bound unto W. B. Thompson in the full and just sum of Seven Thousand Dollars ($7,000) to be paid to the said W. B. Thompson, his successors, representatives and assigns for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 10th day of April, in the year of our Lord, One Thousand, Nine Hundred and Five.

Whereas at a regular term of the District Court of the State of Texas held in Hamilton County, Texas, on March 22, 1904
107 in the suit pending in said court between W. B. Thompson, plaintiff, and P. O. Cox, W. M. Evans and Sam Levy, defendants, a judgment was rendered against said defendants for the sum of Three Thousand Dollars besides cost of suit, and

Whereas from said judgment the said defendants appealed said case to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, which court on the 11th day of January, 1905 rendered a judgment affirming said judgment of the District Court of Hamilton County, Texas, and

Whereas a motion for rehearing was duly made in said court and overruled, and thereafter on the 15th day of March, 1905 within the time prescribed by law, a petition for a writ of error to the Supreme Court of Texas was duly filed in the Clerk's office of said Court of Civil Appeals for the Third Supreme Judicial District of Texas, and

Whereas said petition was rejected and refused by the Supreme Court of the State of Texas on the 22nd day of March, 1905, and the said defendants, P. O. Cox, W. M. Evans and Sam Levy have obtained a writ of error and filed a copy thereof in the clerk's office of the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, to reverse the judgment in the aforesaid suit, and a citation to the said W. B. Thompson or his attorneys of record citing and admonishing him to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said

P. O. Cox, W. M. Evans and Sam Levy shall prosecute their said writ to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] P. O. COX,
By SAM LEVY, *Ag't.*
SAM LEVY.
W. M. EVANS.
UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MARYLAND,
By J. J. MASSIE, *Gen'l Ag't.*

Sealed and delivered in the presence of:
W. Y. QUINCE.
C. C. ECHOLS.

108 STATE OF TEXAS, *County of Tarrant:*

On this 10th day of April, 1905 personally appeared before me, J. J. Massie who says that he is the Agent of the United States Fidelity & Guaranty Co. of Baltimore, Maryland, that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said J. J. Massie acknowledged such instrument to be the free act and deed of said corporation.

J. C. TERRELL, Jr.,
Notary Public in and for Tarrant County, Texas.

I hereby approve the foregoing bond and sureties this 10th day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

(Endorsed:) P. O. Cox *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Supersedeas Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr., 10th, 1905. R. H. Connerly, Clerk.

109 *Bill of Costs of Court of Civil Appeals.*

No. 3394.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

Appeal from Hamilton County.

Filing Record	.50
Docketing Cause	.50
Appearances	1.00

Filing Briefs	
Filing and Entering Motions	1.50
Orders	.70
Filing 17 Extra Papers	4.00
Judgment	1.70
Taxing Costs	1.00
Mandate	.50
Recording Opinion	1.50
Certified Copy of Bill of Costs	1.80
Certified Copy Orders to Supreme Court	.75
Transcript Fee to U. S. Sup. Crt.	2.00
Notices (9)	57.00
Issuing 1 Precept	4.50
Sheriff's Fees	1.00
Copies of Motion	.75
Costs of Sup. Crt. of Texas	3.30
	7.00
Total	$91.00

110 I, R. H. Connerly, Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, hereby certify that the foregoing 109 pages contain true and correct copies of all the proceedings had in the District Court of Hamilton County, Texas, in this Court and in the Supreme Court of Texas, as the same appear from files of this Court in Cause No. 3394, styled, P. O. Cox *et al vs.* W. B. Thompson, appeal from Hamilton County. And, I further certify that the following four pages are the original citation in error and original writ of error in said cause filed in this Court.

Witness my hand and the seal of said Court at office in Austin, Texas, this the 1st day of May, A. D. 1905.

[SEAL.]

R. H. CONNERLY, *Clerk.*

111 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,

vs.

W. B. THOMPSON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between W. B. Thomp-

son who resides in Hamilton County, Texas, and who was plaintiff in the District Court of Hamilton County, Texas, and was appellee in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and is defendant in error herein, and P. O. Cox who resides in Comanche County, Texas, and Sam Levy and W. M. Evans who reside in Tarrant County, Texas, who were defendants in the District Court of Hamilton County, Texas, appellants in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and plaintiffs in error herein, wherein was drawn in question the validity of a statute of the state of Texas on the ground of the said statute being repugnant to the Constitution of the United States, and the decision was in favor of its validity and manifest error hath happened to the great damage of the said P. O. Cox, Sam Levy and W. M. Evans as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, then under your seal, distinctly
112 and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you may have the same at Washington on the 10th day of May, 1905, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court this 11th day of April, in the year of our Lord, 1905.

[Seal of the U. S. Circuit Court, Western Dist. Texas.]

D. H. HART,
Clerk of the United States Circuit Court for the Western District of Texas.
By SCOTT W. KEY, *Deputy.*

Allowed by
C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

A copy of this writ is this day filed in my office for use of the defendant in erro-.

R. H. CONNERLY,
Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

113 [Endorsed:] Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, April 11th, 1905. R. H. Connerly, Clerk.

114 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox ET AL., Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Citation in Error.

The United States of America to W. B. Thompson who resides in Hamilton County, Texas or his attorneys of record, Maine & Chesley who also reside in Hamilton County, Texas, Greetings:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, wherein P. O. Cox, W. M. Evans and Sam Levy are plaintiffs in error and W. B. Thompson is defendant in error, and show cause, if any there be, why — judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas this 10th day of April in the year of our Lord One Thousand Nine Hundred and Five.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

115 We hereby accept service of this citation and acknowledge receipt of a true copy thereof.

MAIN AND CHESLEY,
J. C. MAIN,
H. E. CHESLEY,
Attorneys of Record for W. B. Thompson.

116 [Endorsed:] Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 18, 1905. R. H. Connerly, Clerk.

Endorsed on cover: File No. 19,768. Texas court of civil appeals. 3d supreme judicial district. Term No. 267. P. O. Cox, Sam Levy, and W. M. Evans, plaintiffs in error, *vs.* W. B. Thompson. Filed May 16th, 1905. File No. 19,768.